(Re)constructing purpose for retrogression / (Re)constructing retrogression for a purpose

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Abstract

The doctrine of non-retrogression – sometimes known as a prohibition on 'backwards steps' – in economic and social rights has garnered increasing attention in the aftermath of the financial and economic crises. The attention has clarified aspects of the norm, and has gone some way to providing rights-holders with a vitally needed tool in the context of recent austerity programmes. Yet despite this solid base of attention and the successive enumerations of the doctrine by the CESCR, there remain serious deficiencies in the understanding of the doctrine.

The core of this thesis addresses the need for a fuller understanding. It considers retrogression in a systematic way and addresses a number of routes to realising rights. While doing so, the work focuses on the problem areas to provide a deeper consideration. The research identifies and addresses a series of fundamental questions that still afflict retrogression, including: where did the doctrine originate from; what is the conceptual basis for the doctrine; how might the doctrine be reformed to better pursue a role within the ICESCR system; what are the key tests of a successful doctrine; and to what extent could a reformed doctrine address these key challenges?

It is argued that non-retrogression's past is deeply confused, and its future will be beset with challenges. In the process of making this argument, the thesis contextualises, deconstructs, repurposes, reconstructs, and tests the doctrine. The end result is a fuller picture of the severe limitations of the current forms of the doctrine of non-retrogression, and the positing of a reconstructed doctrine that is less vulnerable to the many threats to non-retrogression's success.

Contents

Detailed Table of Contents

Declaration and Statement of Copyright

I confirm that no part of the material presented in this thesis has previously been submitted by me or any other person for a degree at this or any other university. In all cases, where it is relevant, material from the work of others has been acknowledged.

Chapter Six draws on material which has been published in the following form;

> Ben TC Warwick, 'Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65 International and Comparative Law Quarterly 249.

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Figures and Tables

Abbreviations

ACHR	American Convention on Human Rights
ALI	American Law Institute
CAT	Convention Against Torture
CESCR	Committee on Economic, Social and Cultural Rights
CommRC	Committee on the Rights of the Child
CPR	civil and political rights
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECommSR	European Committee on Social Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
ESR	economic and social rights
GC	General Comment
IACHR	Inter-American Commission on Human Rights
IBoR	International Bill of Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	international human rights law
ILO	International Labour Organisation
IMF	International Monetary Fund
MAR	maximum of available resources
MAR under OP	Statement on *'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant'*
NGO	non-governmental organisation
NHRI	national human rights institution
OP	Optional Protocol to the ICESCR
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

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CESCR, List of Issues prior to Submission: Spain (UN Doc E/C12/ESP/QPR/6 2016)

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Commission on Human Rights Provisional Agenda (1946) UN Doc E/HR/5

Commission on Human Rights, *Draft Report of the Seventh Session of the Commission on Human Rights (Chapter III)* (UN Doc E/CN4/635/Add1 1951)

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Statement of Essential Human Rights Presented by the Delegation of Panama (1946) UN Doc E/HR/3

Summary Record of the 248th Meeting of the International Law Commission (1954) UN Doc E/CN.4/SR.248

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) UN Doc E/CN.4/1987/17

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Third Committee of the General Assembly, *Agenda Item 43* (UN Doc A/C3/SR1184 1962)

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Third Committee of the General Assembly, *Draft International Covenants on Human Rights* (UN Doc A/5365 1962)

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Chapter 1

Retrogression in the Spotlight: An Introduction

1.1. Introduction

The financial and economic crises[1] of 2007/2008 were, amongst many other things, a stellar diagnostic tool. They showed up more clearly than ever the existence of legal and social fractures, redundancies and disorder. One such diagnosis related to the underdeveloped and unconvincing doctrine of non-retrogression.

The crises thrust the doctrine of non-retrogression into the frame as a tool of valuable human rights resistance to the direct and indirect effects of the crises. Yet, instead of resistance to fiscal austerity and its frequently rights-violating policies, the doctrine shrunk in the spotlight.

To imagine the lack-lustre performance of the doctrine of non-retrogression in protecting economic and social rights[2] as an attack of 'stage-fright' however, would be to ignore the significant deficiencies that had pre-existed the crises. The boundaries, conditions, purpose and conceptual identity of non-retrogression were, and to a large extent still are, all indefinite. Yet, this follows more than twenty-five years of development by the principal guardian of this legal mechanism, the UN Committee on Economic, Social and Cultural Rights (CESCR; the Committee). The Committee has devoted a reasonable quantity of attention to the doctrine, but this attention has lacked consistency, clarity, and quality. In addition, the CESCR has rarely applied the doctrine in practice. The result has been a

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[1] Throughout the work the financial and economic crises are referred to as two separate 'crises' rather than a conjoined 'crisis'. This is to emphasise the different starting points, impacts and potential responses to each crisis (for a discussion of each see Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (PublicAffairs 2011); Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso 2013)). Seeing the crises in plural form also serves to destabilise the narrative of these events as 'The Crisis' which has served to obscure the cause(s) of the most recent turbulence, and the existence of predecessor crises and their impacts (on the sleight of hand that the term 'Crisis' enables see Ferdi De Ville and Jan Orbie, 'The European Commission's Neoliberal Trade Discourse Since the Crisis: Legitimizing Continuity through Subtle Discursive Change' (2014) 16(1) The British Journal of Politics & International Relations 149, 150.; on the numerous other crises faced by the CESCR see Aoife Nolan, Nicholas J Lusiani and Christian Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 126). One such crisis that was side-lined in dominant crisis discourse was the crippling world food crisis that preceded both of these financial and economic phenomena. While the roots of this crisis can be traced back to similar macroeconomic processes it has largely been seen as a distinct issue (Special Rapporteur on the Right to Food, *Building Resilience: A Human Rights Framework for World Food and Nutrition Security* (UN Doc A/HRC/9/23 (Appendix I) 2008) 27ff).

[2] The phrase 'economic and social rights' (abbreviated to ESR) is used here to cover the full range of economic, social and cultural rights as expressed in the International Covenant on Economic, Social and Cultural Rights. The analysis applies equally to 'cultural' rights as to 'social' and 'economic' rights and as such the use of 'ESR' is a stylistic rather than substantive choice. Young posits that the terminological variations in this area of study are geographically bounded, noting the use of the terms, '"social welfare rights" and "economic rights" (North America), "socio-economic rights" (South Africa), and "social rights" (Europe)' (Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 The Yale Journal of International Law 113, 118, note 19; for furtehr discussion see, Terence Daintith, 'The Constitutional Protection of Economic Rights' (2004) 2(1) International Journal of Constitutional Law 56, 57ff.). The terms are commonly seen as interchangeable; Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 3–4.

complex doctrine, with deeply confused conceptual roots, that is unable to meet the primary challenges of utility and implementation that it faces.

First appearing in 1990 the doctrine took a concise form, with the CESCR noting that:

> any deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[3]

Attention to this brief statement of the CESCR from the academy and NGOs has gathered apace especially since the most recent financial and economic crises. This attention has served to highlight a number of the doctrine's deficiencies and to suggest a number of strategies that might be employed in order to effectively enforce non-retrogression obligations.[4] This clarity has proved important in developing a fuller understanding of States' obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5] It has gone some way to providing rights-holders with a vitally needed tool in the context of recent austerity programmes which have threatened ESR in exactly the way that the non-retrogression doctrine aims to prevent. Yet despite this solid base of attention and the successive enumerations of the doctrine by the CESCR, there remain serious deficiencies in the understanding of the doctrine.

The core of this thesis addresses the need for a fuller understanding. It considers retrogression in a systematic way and addresses the full array of routes to realising rights. While doing so, the work zooms in on the problem areas to provide a deeper consideration. The research identifies and addresses a series of fundamental questions that still afflict retrogression, including: where did the doctrine originate from; what is the conceptual basis for the doctrine; how might the doctrine be reformed to better pursue a role within the ICESCR system; what are the key tests of a successful doctrine; and to what extent could a reformed doctrine address these key challenges?

In the process of addressing these questions the thesis contextualises, deconstructs, repurposes, reconstructs, and tests the doctrine. It argues that there is not a single doctrine of non-retrogression, but rather are several versions that require repurposing to allow the doctrine to more effectively respond to challenges. Particular challenges that are explored in the course of the thesis are those coming from the largest and most high-level structural

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[3] CESCR, General Comment 3: The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant) (UN Doc E/1991/23, 1990) para 9.

[4] See, eg, Nolan, Lusiani and Courtis (n 1).

[5] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3).

issues; the particular distortions that crises can bring; the challenges for a technical, international doctrine in meeting the demands of micro groups; and the very real difficulties faced in practically applying the doctrine's terms. In doing this the research adopts a forward looking approach, seeking new solutions to future problems.

1.2. Situating the Thesis

This research comes at a significant point in time. It is now 50 years since the ICESCR was adopted, and the Covenant has a ratification rate of almost 85% of States.[6] After the long absence of an effective monitoring mechanism for the ICESCR, the CESCR is now approaching its thirtieth year of operation. It has produced 23 General Comments and another 24 substantive statements. The Optional Protocol to the ICESCR is, at last, on its feet and the CESCR has issued substantive views on two Communications.[7] Further, if the recently superseded Millennium Development Goals are taken as a proxy, some of the most crucial ESR indicators are at their all-time high water mark.[8]

The depth of interest in ESR globally is also impressive. Networks of NGOs, scholars, monitoring bodies, courts and more informal advocacy groups centre their attention on the rights. This attention has brought an added depth and texture to the normative frameworks, resulting in the analysis of: ESR indicators and fact finding;[9] the question of whether, and under what standards of review, ESR disputes can be adjudicated upon;[10] new

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[6] The ICESCR has 164 States Parties, out of a United Nations membership of 193, amounting to 84.9% (as at 20 September 2016).

[7] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013, UN Res A/RES/63/117); *IDG v Spain* [2015] CESCR Communication 2/2014, UN Doc E/C.12/55/D/2/2014; *López Rodríguez v Spain* [2016] CESCR Communication 1/2013, UN Doc E/C.12/57/D/1/2013.

[8] Catharine Way (ed), *The Millennium Development Goals Report 2015* (United Nations 2015) 5–7 (but see also the very poorest, women and those affected by climate change who have been left behind at p8).

[9] See, eg, Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23(4) Human Rights Quarterly 1062; Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford University Press 2015); Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP USA 2016) especially chs 1, 2, 3, 17.

[10] See, eg, Malcolm Langford (ed), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (Cambridge University Press 2008); Fons Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006); Fons Coomans and Universiteit Maastricht. Centre for Human Rights, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia ; Holmes Beach, Fla 2006); Malcolm Langford editor, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008); Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' [2007] Center for Human Rights and Global Justice, Working Paper Number 15, Anashri Pillay, 'Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights' (2007) 6 European Human Rights Law Review 616; Anashri Pillay, 'Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom' (2013) 3 Public Law 599; Jeff King, *Judging Social Rights* (Cambridge University Press 2012); Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' (2003) 82 Texas Law Review 1895.Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39.

ways of ESR enforcement;[11] economic and budgetary questions;[12] and what has often been termed the 'nature' of the rights (i.e. the foundations, philosophy and core content behind ESR).[13]

And yet, the founding vision of the ICESCR is far from being realised. There remain gaping holes in ESR protection and a multitude of new and continuing threats to the enjoyment of rights generally. In the words of a joint communique of the UN special procedures:

> human rights remain under severe threat, including from conflict, poverty and inequality, the adverse impact of climate change, the backlash against women's human rights, abuses by non-state actors and attacks against the universality of human rights, democracy and the rule of law.[14]

Of course, the financial and economic crises of 2007/2008 and the following rush to fiscal austerity in many countries throughout the world, pose yet another threat to ESR standards. It is unsurprising that the combination of an economic downturn and a contractionary turn in fiscal policy affected economic and social rights most seriously,[15] and the most vulnerable disproportionately.[16] As has by now been clearly demonstrated,[17] the human rights response to the crises was slow and ineffective. The meagre use of ESR and the frail response of the CESCR to the financial and economic crises is a case study in the space (perhaps, the chasm) between the promise and reality of ESR enforcement.

Less headline-grabbing, but crucial to improving this overall picture, is the way in which ESR have sometimes been side-lined by micro groups in their calls for improved social conditions. Globally, protests against State economic policies have not tended to organise

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[11] See for example; Audrey R Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) Human Rights Quarterly 23; Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights' (1994) 16 Human Rights Quarterly 693.

[12] See for example; Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014); contributions in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013); Aoife Nolan and Mira Dutschke, 'Article 2 (1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) 3 European Human Rights Law Review 280; Radhika Balakrishan and others, 'Maximum Available Resources & Human Rights: Analytical Report' (Rutgers University 2011); contributions in Radhika Balakrishnan, James Heintz and Diane Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (Routledge 2016).

[13] See for example; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156; Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press; OUP 1995); M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

[14] UN Experts, 'As the Covenants Turn 50, It Is Time to Turn Norms into Action' (*OHCHR*, 10 December 2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16861&LangID=E> accessed 20 September 2016.

[15] Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1 Journal of Human Rights Practice 277.

[16] Independent Expert on the question of human rights and extreme poverty, *Rights-Based Approach to Recovery* (UN Doc A/HRC/17/34 2011) para 23.

[17] Aoife Nolan, 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) 4 European Human Rights Law Review 360; Saiz (n 15).

around ESR standards.[18] Where rights discourse has been used, there has been little evidence of a tie to legal standards.[19] At the other extreme of power and scale, but equally concerning, is the manner in which the rights have failed to reliably influence high-level policy making. This 'disregard not only of substantive rights protections but of the very idea of state responsibility' was acutely demonstrated as responses to the crises took shape.[20]

Doctrinally, too, the ICESCR has some pressing issues. While there is now at least a basic shape to most of the norms in the Covenant, much further attention is still required. The general obligations of the ICESCR remain some of its most under-developed. For example, despite the acknowledged centrality of the progressive realisation obligation to a basic understanding of ESR, there are still no clear answers on its justifications, functioning, or monitoring. Similarly, there are developing but broad answers on the scope of the maximum available resources obligation and the general limitations clause. The same is true of the typologies and analytical frameworks. While these were originally developed to help demonstrate that ESR could be successfully deconstructed into more manageable segments, they now form part of the CESCR's approach to the rights. As such, their future role requires clarification, and if their use is to continue then further honing and pruning is needed.

Touching on very nearly all of the issues outlined above is the doctrine of non-retrogression. It has been referred to as a doctrine governing backwards steps,[21] but its content can be more broadly conceived as rebuking State failure. In facing up to the deep challenges sketched above, such a doctrine could barely be more relevant. Used properly, non-retrogression could be potent in tackling State failures and their threats to rights, while also having the potential to supplement some of the flaws in the ICESCR's doctrinal content and mask the CESCR's institutional frailties. Yet, the doctrine is currently far from realising such potential. The trends which the doctrine is well-placed to address are complex and require further unpacking. To do so, the following section will outline the current literature, before providing a brief survey of the legal landscape.

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[18] Sara Burke, 'Human Rights Missing from Social Justice Activism' (*openDemocracy*, 29 September 2015) <https://www.opendemocracy.net/openglobalrights/sara-burke/human-rights-missing-from-social-justice-activism> accessed 20 September 2016.

[19] For a distinction between the use of rights discourse and rights ideology in protest, see Thomas Murray, *Contesting Economic and Social Rights in Ireland: Constitution, State and Society, 1848-2016* (CUP 2016). Much of recent social activism would also be likely to fall short of Madlingozi's definition of 'effective legal mobilisation' Tshepo Madlingozi, 'Post-Apartheid Social Movements and Legal Mobilisation' in Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa: Symbols Or Substance?* (CUP 2013) 94–5.

[20] Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 European Law Journal 521, 522.

[21] See Chapter 3, pp74-76.

1.2.1. Relevance

The thesis research has relevance to a number of closely interrelated and current needs. The first of these is the improvement of legal standards. Second, is the substantive improvement in rights protections. The third is the development of 'knowledge' and scholarly understanding of the law, its rationales, and its implications. The outcomes which the research seeks are, therefore, a firmer understanding of the law, more effective legal standards, and improved rights enjoyment.

These research objectives are, given the scope of the thesis, pursued in the context of the doctrine of non-retrogression. The relevance of non-retrogression to each of the ICESCR's current needs is easily demonstrated. As the failings of non-retrogression are predominantly legal-doctrinal, there is significant scope for improving the overall legal standards related to ESR through a detailed analysis of the normative content of the doctrine.

Yet, it is also clear that the practice of the CESCR has been deficient. No matter how incomplete the doctrinal position of non-retrogression, the Committee could have done much more to add clarity to, and enforce the norm. In other words, the CESCR has failed to follow through on the promise of the doctrine. Again, in the context of the current research, this implies that thorough analysis of the operation of non-retrogression in its institutional context can bring significant gains in substantive ESR enjoyment.

The final need – the need for an improved scholarly understanding of non-retrogression – can also be addressed through a systematic examination of the legal standards. Despite its broad applicability and many problematic aspects, the doctrine has thus far been subject to only limited critical attention. Tackling non-retrogression in depth can improve knowledge and understanding of the norms.

In specific terms, then, how is the research relevant? It is, perhaps as a result of its practical orientation, of significant relevance to a range of actors. It provides a new degree of precision on the role, origins, applicability and enforcement of the doctrine. This is meaningful for States wishing to determine the extent of their ESR obligations, for the CESCR wishing to hold them to account, for advocacy groups attempting to mount arguments against retrogressions in ESR protection, and for individuals who wish to know the scope of their legal rights.

The thesis addresses the full suite of routes to rights 'vindication' (to borrow the term used prominently by Paul O'Connell).[22] It is well known that the IHRL system entails a number of enforcement difficulties by virtue of its international and consensual constitution. While recognising this limitation, the analysis below also promotes the idea that there are many means of enforcing ESR that are not currently being used to their full potential. It therefore tends towards looking at enforcement mechanisms with commonalities or complementarities with non-retrogression.

One type of enforcement, however, that is not extensively engaged with here are domestic mechanisms. The reasons for this are two-fold. The first of these is a simple choice of research design. The research is centred on understanding non-retrogression at the international level, meaning the very wide range of international documents and the numerous approached to retrogression at that level are the most relevant. This design choice is supported by the exceptional need for analyses of retrogression at that level, especially in light of landmark developments such as the CESCR's Letter to States and the Optional Protocol.[23] The second reason is more instrumental as, even if national systems were considered to a greater degree, there would be little clarity to be gained. The diverse systems of national laws, patchy enforcement, and deeply contextual meanings of retrogression-like laws, all limit their relevance to the international sphere.[24] Besides this qualification, and in order to contribute some progress in enforcement efforts, the research takes a broad approach to draw out the links between legal developments and substantive gains in ESR protection.

The relevance of the research is therefore grounded in a systematic view of the importance of the subject matter, the actors that shape norms and practice, and the values underpinning the legal area. This combination is intended to ensure that important questions are addressed in a useable manner.

1.2.2. State of the Art

[22] Paul O'Connell (n 2).

[23] Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (n 7).

[24] For discussion of this patchy jurisprudence see text attached to nn36-47 below.

The thesis is written against the backdrop of some quantity of attention, but little *critical* attention. The doctrine of non-retrogression is frequently mentioned in the CESCR's General Comments.[25] However, these invocations are inconsistent and often brief.[26] NGOs are also regular visitors to the non-retrogression concept.[27] Many NGO uses will invoke the doctrine of non-retrogression to describe a reduction in rights standards with little attention to the full meaning and conditionality of the legal norm.[28] The preponderance of the academic literature is similarly simplistic.[29] While the doctrine is sometimes used in argument, it is rare to find more than one or two versions of it detailed, and critical attention (highlighting the irregular use of the doctrine, its inconsistencies, its conceptual flaws or similar issues) is seldom present. Likewise in general usage, for example in the (mainstream and social) media or in everyday discussion the term or idea is infrequently used with an understanding of its legal depth.[30]

There are two exceptions to this general picture. The first of these relates to the minority of the academic literature. While it is true that the general picture of the scholarship is of a superficial approach to the doctrine, there are a handful of notable exceptions. Key

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[25] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) para 9; CESCR, *General Comment 13: The Right to Education (Art 13 of the Covenant)* (UN Doc E/C12/1999/10 1999) para 13; CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 32; CESCR, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (UN Doc E/C12/2002/11 2002) para 19; CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)* (UN Doc E/C12/2005/4 2005) para 42; CESCR, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15(1)(c) of the Covenant)* (UN Doc E/C12/GC/17 2006) para 27; CESCR, *General Comment 18: The Right to Work (Art 6 of the Covenant)* (UN Doc E/C12/GC/18 2005) para para 21; CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 42; CESCR, *General Comment 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a) of the Covenant)* (UN Doc E/C12/GC/21 2001) para 65; CESCR, *General Comment 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)* (UN Doc E/C12/GC/22 2016) para 38; CESCR, *General Comment 23: The Right to Just and Favourable Conditions of Work (Art 7 of the Covenant)* (UN Doc E/C12/GC/23 2016) para 52. See further a timeline of the CESCR's use of the doctrine of non-retrogression at Appendix A.

[26] See further Appendices A and B and Chapter 3.

[27] For a selection see The Right to Education Project and Coalition, *The UK's Support of the Growth of Private Education through Its Development Aid: Questioning Its Responsibilities as Regards Its Human Rights Extraterritorial Obligations* (2015) paras 57, 58; David Suzuki Foundation, *Environmental Protection of Economic, Social and Cultural Rights on the Pacific Coast of Canada* (2016) paras 47, 48, 58; Amnesty International, *Canada: Submission to the UN Committee on Economic, Social and Cultural Rights* (2016) 17; Joint Civil Society Organizations, *Alternative Report to the UN Committee on Economic, Social and Cultural Rights on the Occasion of the Review of the Republic of Kenya* (2016) 7; Amnesty International, *Spain: Submission to the UN Committee on Economic, Social and Cultural Rights* (2016) especially 8–11.

[28] See, eg, The Charter Committee on Poverty Issues and Social Rights Advocacy Centre, *The Right to Effective Remedies for Economic, Social and Cultural Rights in Canada* (2016) para 3; Joint Civil Society Organizations, *Towards the Realization of Economic, Social and Cultural Rights in Kenya* (2016) 23.

[29] Although it should be noted that the focus of each of these authors is largely elsewhere, a selection of basic treatments of the obligation can be seen in, Cecily Rose, 'The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption' (2011) 24 Leiden Journal of International Law 715, 720, 734; Noel Villaroman, 'The Need for Debt Relief: How Debt Servicing Leads to Violations of State Obligations under the ICESCR' (2010) 17 Human Rights Brief 2, 6–7; Fons Coomans, 'Justiciability of the Right to Education' (2009) 2 Erasmus Law Review 427, 131; Katja Luopajärvi, 'Is There an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?' (2003) 15 International Journal of Refugee Law 678, 686; Radhika Balakrishnan and Diane Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights' (2008) 5(1) Essex Human Rights Review 6; Marcelo Thompson, 'Property Enforcement or Retrogressive Measure? Copyright Reform in Canada and the Human Right of Access to Knowledge' (2007) 4(1&2) University of Ottawa Law & Technology Journal 162.

[30] An indicative search of UK news results shows around 550 uses in the last 10 years, with none being linked to social rights. Generally, the term is used instead as an approximate alternative for 'backwards', or as a substitute for the term 'regressive' in relation to taxation (LexisNexis search, January 2016).

contributions (in chronological order) from Sepúlveda,[31] Courtis,[32] Nolan,[33] O'Connell *et al*,[34] and Nolan *et al*,[35] have begun, progressed, defined and shaped critical attention to non-retrogression. The thesis employs these (and some other) more critical and deeper examinations of the doctrine, rather than being substantively coloured by the larger quantity of material that is predominantly focussed on other issues.

The second exception to the frequent-but-basic trend in uses of non-retrogression, is the emerging presence of the doctrine outside of the ICESCR context. For example, courts in the United Kingdom have (briefly) referred to the doctrine,[36] as have courts in New Zealand,[37] Peru,[38] South Africa,[39] and Kenya.[40] Nolan et al, additionally highlight the use of retrogression-type ideas by constitutional courts in Hungary, Latvia, Germany and Portugal.[41] At the European Court of Human Rights two separate opinions of Judge de Albuquerque have endorsed a substantively similar, but more basic, doctrine of non-retrogression in relation to 'social rights'.[42]

The European Committee on Social Rights (ECommSR) and the Inter-American Commission on Human Rights (IACHR) have slightly more developed approaches to non-retrogression, although each rests its reasoning more explicitly on non-ICESCR instruments. For example, the ECommSR has made a strong finding of retrogression in

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[31] Sepúlveda (n 13).

[32] Christian Courtis, 'La Prohibicíon De Regresividad En Materia De Derechos Sociales: Apuntes Introductorios' in Christian Courtis (ed), *Ni Un Paso Atrás: La Prohibicíon De Regresividad En Materia De Derechos Sociales* (Editores de Puerto 2006).

[33] Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights* (Hart 2013); see also earlier discussion of the concept by this author in Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing 2011) 248ff.

[34] O'Connell and others (n 12).

[35] Nolan, Lusiani and Courtis (n 1).

[36] *R (on the application of Hurley and Moore) v Secretary of State for Business Innovation & Skills* [2012] EWHC 201 (Admin) [38]; *R (on the application of Aspinall, Pepper and Others) (formerly including Bracking) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin) [35] - [38].

[37] *Refugee Appeal Nos. 75221 & 75225* [2005] NZRSAA 289 [21], [32]; *BG (Fiji)* [2012] NZIPT 800091 [98].

[38] *Lima Asociacion De Tecnicos Y Sub-Oficiales De Procedencia v Reserva Del Ejercito Peruano* [2007] 03477-2007-PA/TC [22].

[39] *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 [105]; *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT 11/00) [2000] ZACC 19 [45]; *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 [157].

[40] The relevant parts of the *Grootboom* judgment quoted by *Mutemi v Permanent Secretary, Ministry of Education and Others* [2013] eKLR 133/2013 (High Court of Kenya) [19].

[41] Nolan, Lusiani and Courtis (n 1) 143–144.

[42] *Konstantin Markin v Russia* App no 30078/06 (ECtHR, 22 March 2012) (Partly Concurring, Partly Dissenting Opinion of Judge Pinto De Albuquerque (Concurring part)), discussion attached to fns 29-30. The Judge cites *inter alia* six CESCR General Comments. However, in citing the International Court of Justice, the Judge would also seem to conflate the doctrine of non-retrogression with a general limitations clause; *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory* [2004] No 131 (ICJ), para 136. In another judgment, again in a concurring opinion, de Albuquerque notes the impact of the retrogressive measures doctrine; *K.M.C. v Hungary* App no 19554/11(ECtHR, 19 November 2012), fn 19.

relation to fiscal austerity[43] grounding itself in article 12 section 3 of the European Social Charter.[44] The IACHR draws on the CESCR's General Comment 3,[45] to find that article 26 of the American Convention on Human Rights entails an analogous non-retrogression duty.[46] The IACHR also argued before the Inter-American Court in the more well-known *Five Pensioners* case, that 'States may not adopt regressive measures in relation to the level of development achieved'.[47]

In some respects, then, the approaches to non-retrogression can be seen as nascent. This characterisation is especially true of critical approaches to the contents and context of the doctrine. While the CESCR continues to detail it in General Comments, and there are regular invocations of it in academic literature and NGO submissions, there is little engagement with, or critical attention to, the doctrine. National and regional courts and tribunals currently cite non-retrogression rarely, and it is clear that the doctrine is currently at an early stage of its development and has little influence at those levels.

1.3. Limitations, Approach and Methods

A number of different theoretical, methodological and disciplinary approaches are combined in addressing the research questions. Non-retrogression is deceptively wide-ranging, with consequences and demands far beyond what a narrowly-drawn legal analysis could address. As such the different chapters that follow rely on theories from law, economics, and sociology, and invoke methods and 'ways of thinking' from law, history, and political science. This more diverse approach allows for a discussion not only of *what* retrogression is, but *why* it is needed, and *how* it functions.

As within any piece of research, however, there are boundaries and limitations to what is offered here. There is no claim to comprehensiveness in the chapters that follow. One of the most notable circumscriptions of the work is its focus on the international level (i.e. the ICESCR, CESCR, and the Optional Protocol). This facilitates a deeper attention of the issues in this arena, and it is this depth that most helpfully advances the legal position. As is developed in the chapters of the thesis, many of the problematic aspects of the doctrine have been created and perpetuated by shallow attention from the CESCR and other actors.

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[43] *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* [2012] 66/2011 (European Committee on Social Rights), para 47.

[44] *European Social Charter* (signed 18 October 1961, entered into force 26 February 1965, UNTS 89 (ETS 155)).

[45] *Jorge Odir Miranda Cortez et al v El Salvador* [2001] IACtHR Case 12.249, Report No. 29/01 , para 105.

[46] ibid para 106 (and fn 64).

[47] *Case of the 'Five Pensioners' v Peru* [2003] IACtHR Series C No.98 , para 142b.

Therefore, the thesis' approach of sustained and deep attention acts as a corrective. Although there are no doubt interesting comparisons to be drawn with the approaches under the European Social Charter,[48] or in national settings,[49] their inclusion would have risked surveying, without properly addressing, the doctrine's issues. In much the same way, the research has excluded the question of retrogression's applicability to civil and political rights, or more generally in other legal contexts.

Another limitation of note is the approach taken towards the recent austerity programmes. This research is to a large extent focussed on the doctrine rather than the circumstances to which it could be applied. While examples are, of course, used in the process of analysing the doctrine, they are the secondary focus. Therefore, chapter 6, while focussing on the crisis, looks at how the doctrine was affected by it rather than the converse. In this vein, there remains clear scope for a project that applies the doctrine of non-retrogression to a variety of austerity and other measures. In many senses this would be the (politically) more attractive project.

There are four strong reasons why such an approach was not adopted here. First, and most straightforwardly, it is the CESCR which is empowered to make judgements on the presence – or not – of retrogression. There would, in the end, be little to be gained by making sustained judgments in the place of the Committee, or even by highlighting obvious cases that 'might have been'. This would only be to demonstrate (and not even in a clear cut way) what is already widely suspected; that the CESCR has not perfected its approach to the doctrine. Secondly, even if such an approach was the preferred one, there would be inadequate information to make it successful. There are, as is fully discussed in several places below, many gaps and uncertainties in the normative framework and a chronic lack of applied examples. As such, the doctrine's full application to a test case would be such a highly speculative exercise so as to have little value. Thirdly, such a practical application would be a partial duplication of some of the existing examples of legal/rights responses to austerity.[50] The final, and perhaps most crucial reason against this approach, is the scope of

[48] For some discussion, see Eibe H Riedel, *Social Security as a Human Right: Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Springer Science & Business Media 2006) 185; Salomon (n 20) 540–1. The European Committee on Social Rights has, for example, found 'that financial consolidation measures which fail to respect [the core framework of social security, deny protection against shocks, or are exclusionary] constitute retrogressive steps which cannot be deemed to be in conformity with Article 12§3'; *General Federation of Employees* (n 43). See also, Luis Jimena Quesada, 'Protecting Economic and Social Rights in Times of Economic Crisis: What Role for the Judges?' (2014) fn3, see also 4, 9.

[49] See jurisprudence cited above at nn36-47.

[50] Center for Economic and Social Rights (CESR), 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (2012) <http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf> accessed 20 September 2016; Center for Economic and Social Rights (CESR), 'Spain: Visualizing Rights' (2012)

non-retrogression. While austerity is an important *example* of when retrogression can come about, it is only one example. Non-retrogression, if applied fully, can be an 'everyday' tool for ESR enforcement. To frame any sustained analysis of the doctrine solely in terms of the financial and economic crises, however important these have been for the doctrine and however damaging for the rights, would be to skew the picture of the legal standards.

A further thread that runs through the research is the forward looking style. It is persistently acknowledged in the chapters below that while the pace of the ICESCR's development is relatively slow, the external environment (i.e. the world beyond the ESR norms) moves at speed. As such, the research has avoided attempts *for their own sake* of an autopsy of the responses to the crises. Likewise, while there is much to say the Optional Protocol, the research has sought not to simply lament the years without it. Of course, these and other histories are often used below to aid analyses of future directions, but they are not carried out for purely retrospective purposes. This leads the thesis to take as givens certain well-argued and largely settled debates on justiciability, interdependence, and whether ESR are 'real rights'.

While the research excludes a focus on these issues, it is in many other respects, very open. The research questions are addressed with reference to a number of theoretical, disciplinary and methodological perspectives. Theoretically, the work is diverse precisely in order to facilitate an open and balanced assessment of the doctrine and to allow its analysis and findings to be acceptable to a broader range of readers. This is certainly not the only approach that could have been taken, and a purely positivist approach to the subject matter or, at the opposite pole, one grounded in critical legal theory would have been very possible. Even within (or besides) these two extremes there were opportunities to adopt, wholesale, a particular theory of social movements, or of emergencies, or of macroeconomics. However, while the research is theoretically engaged and constantly makes use of relevant theories, the underlying approach has been to reduce the polarisation of readers at the level of theory. This approach has been taken so that constructive (dis)agreements can be had that are directly linked to the doctrine of non-retrogression.

In addition to its theoretical diversities, the argument incorporates developments from several disciplinary traditions. This is intended to reflect these disciplines' relevance to, and interest in, the human rights 'project'. Insights from political science, sociology, history, and

<http://www.cesr.org/downloads/FACTSHEET_Spain_2015_web.pdf> accessed 20 September 2016; Styliani Kaltsouni and Athina Kosma, 'The Impact of the Crisis on Fundamental Rights Across Member States of the EU: Country Report on Greece' (Study for the LIBE Committee 2015).

economics are all relied upon. However, given the legal core of non-retrogression's identity, it is unsurprising that the primary frame of reference in what follows is a legal one.

The primary methodological approach that underpins the research is legal-doctrinal research. Much of the analysis and many of the findings are drawn from a close examination of materials from across the spectrum of international human rights law but predominantly relating to the ICESCR. These materials include treaties, General Comments, Statements and Concluding Observations. Another key source throughout the work is the scholarship that is both directly related to retrogression and the indirectly related theoretical or conceptual writings. Beyond the legal methodology, the research at times also draws upon historical methods to more fully contextualise developments and uses basic statistical and mathematical techniques, tables and diagrams. This allows the research to demonstrate the scale of various phenomena, to rebut commonly assumed ideas, and to condense a broad picture into more manageable comparisons.

There is one final aspect of the approach that needs highlighting here. In the thesis' title and throughout the chapters below, the modified purpose and the reformed doctrine that are posited are qualified as '(re)' purposed and '(re)' constructed entities. Although a sometimes cumbersome expression, the bracketing of the qualifier is an important reminder throughout of an important substantive point. Specifically, that the 'purposing' and the 'constructing' of the doctrine that is carried out here can neither be identified as an entirely fresh enterprise, nor a simple repetition of existing efforts. In other words, the work is forced to sit in the space between being a first deliberate purposing and construction of the doctrine, and on the other hand performing a remodelling role which re-purposes and re-constructs the doctrine. Against the backdrop of the doctrine's almost accidental creation, it is impossible – particularly according to a postmodern constructivist standpoint[51] – to properly know whether the process of purposing and constructing retrogression here is novel, or whether it is a revival of previous processes and is therefore more akin to a repurposing and reconstruction.

[51] Martha Finnemore and Kathryn Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics' (2001) 4(1) Annual Review of Political Science 391, 395.

1.4. Structure

The thesis addresses its questions (and many others) in the course of the following eight chapters. In turn, these eight chapters are divided into two parts, each with a different emphasis. Part I focusses on finding or (re)constructing a purpose for the doctrine, while Part II is centred on how the design of the doctrine itself might achieve that purpose.

1.4.1. Part I – (Re)constructing Retrogression for a Purpose

Chapter Two begins with a reminder that while the doctrine of non-retrogression has been a consistent feature of the work of the CESCR, it was not included in the text of the ICESCR. This aspect of the doctrine's history as well as other connected factors (such as the creation of the CESCR itself and the history of the progressive realisation obligation) provide important context for later considerations of the nature and purpose of the doctrine. To provide this historical context, this chapter traces the history of the International Bill of Rights (IBoR), the development of the progressive realisation obligation, and begins to uncover the origins of non-retrogression.

Beyond simply providing context, however, Chapter Two makes a number of findings worthy of attention in their own right. For example, it reviews the *travaux préparatoires* and the ratification records for the IBoR to argue that we should move beyond accounts that solely rely on the Cold War history, towards a more nuanced history of the International Covenants. Further, the chapter seeks to develop a stronger understanding of the reasons for progressive realisation's inclusion and what, latterly, might have provided the impetus for an additional non-retrogression doctrine.

Chapter Three addresses the shapeshifting forms of the doctrine of non-retrogression. Since the genesis of 'the' doctrine of non-retrogression, the CESCR's successive statements defining it have been viewed as comprising a single – and coherent – whole. This chapter subjects that view to sustained critical attention, eventually demonstrating a doctrine that is significantly fragmented. In fact, it is argued that there are nine variations in the doctrine's criteria which can be grouped into four separate models of non-retrogression. These conceptual models are termed the Component, Corollary, Composite, and Un-Coupled models. These four models of non-retrogression are distinguished according to their legal basis and the relationship with progressive realisation that each has.

The four models and the associated analysis leads Chapter Three to conclude that the doctrine lacks a core purpose around which it can be effectively (and cohesively) organised. Thus, while each of the doctrines of non-retrogression have some common features, there is little to bind the models together.

Chapter Four – the final in this (re)purposing phase – takes this analysis a step further. Given the identified fragmentation, and the lack of a core purpose that is shown in preceding chapters, this chapter assesses whether the doctrine of non-retrogression should be continued at all. The doctrine is rescued on the basis of its capacity to remedy the doctrinal flaws of the ICESCR, its 'brand recognition', and a pragmatic recognition of the doctrine's current support. The chapter proceeds instead to consider how the doctrine might be reconsidered in order to become a more coherent and effective norm.

In light of the deficiency in the purpose, it is suggested that reforming the doctrine's purpose could provide non-retrogression with an organising concept for the future. This proposition is carefully defended. Having argued that the doctrine requires a clearly defined purpose, it is then suggested that this should be linked to the progressive realisation obligation. The final stage in the analysis of Chapter Four is to take this new purpose and to re-form, reconstruct or re-orientate non-retrogression in order to better pursue this purpose. As such the chapter concludes by proposing a substantially modified doctrine of non-retrogression.

1.4.2. Part II – (Re)constructing Retrogression for a Purpose

There are a number of key stress tests which the (re)constructed doctrine of non-retrogression must meet in order to show that it might be more effective at pursuing a purpose than the current arrangements are.

Chapter Five addresses the first of these 'stress tests', namely the doctrine's capacity to engage with issues of a truly 'macro' or structural scale (such as globalisation or environmental degradation). The chapter assesses how well the CESCR has previously dealt with structural issues of concern, and considers where the (re)constructed doctrine might gain additional traction.

In its assessment of the Committee's previous efforts in relation to structural issues, Chapter Five delineates several levels of engagement. It considers how the Committee has addressed the larger issues within its mandate through its views under the Optional Protocol, and its Letters, Statements, Concluding Observations and General Comments. It is argued that at present the Committee's approach is limiting in terms of its voice and its relevance on structural issues, and damaging in its inability to provide individual justice for structural ESR violations. The chapter then turns to evaluate how a reconstructed doctrine of non-retrogression might improve these types of engagement.

Chapter Six constitutes a further test for the (re)constructed version of retrogression. It argues that, following the 2007/8 financial and economic crises, the response of the CESCR (following a long delay) was a damaging one. It took the ICESCR system towards greater accommodation of emergencies, and adopted derogation-style language.

The chapter argues that this crisis response demonstrates the risk of retrogression being weakened or dis-applied in times of crisis. It asserts the need for a resilient doctrine of non-retrogression, capable of flexibility while also having an overarching direction attached to it. It looks at how the (re)constructed doctrine might provide such resilience in responding to the next crisis.

Chapter Seven - the third of the 'stress tests' – assesses the doctrine's ability to respond to 'micro concerns' or the concerns of social movements. Engendering this sort of responsiveness is a difficult task given the multiple institutional and doctrinal barriers that surround the CESCR, and the diversity and plurality of social movements. This chapter examines these barriers to the use of non-retrogression in depth, and includes a discussion of how 'micro concerns' are to be defined.

The chapter proceeds to argue, notwithstanding these difficulties, that responding to these groups and their concerns should be of central importance to the CESCR. It is argued that the Committee can benefit from the additional capacity and expertise of these groups, and can be guided by their concerns when formulating strategy and responses. Finally, the chapter turns to assess the possibilities for improved performance. Focussing particularly on the role that the reformed retrogression can play, the analysis suggests a range of straightforward changes in approach that could be made (as well as proposing some more difficult-to-achieve changes).

Chapter Eight presents the final key test for the newly proposed doctrine of non-retrogression. This relates to its ability to meet the practical challenges of enforcement. A range of practical difficulties and confusions have beset the use of the doctrine thus far. These include difficulties with proof, timing and terminology. This chapter details the ways in which the enforcement of the prohibition on retrogression has been restrained. It does so by using a number of examples and through a close look at the dynamics of the CESCR's operations and the demands that have flowed from the doctrine's construction in the past.

The chapter also assesses the (re)construction's prospects of practical success. As a number of the limitations upon effectiveness flow from either the nature of the international rights system or from other constraints upon the Committee, it is acknowledged that a simple doctrinal reconstruction will not enable perfect enforcement. However, it is argued that if the (re)construction is accompanied by institutional and procedural innovations a real and effective function for retrogression can be realised.

The concluding chapter of the thesis (*Chapter Nine*) takes stock of the arguments and analyses advanced in the course of the preceding seven chapters. This chapter, therefore gathers together and systematises the implications of the research for the future of the doctrine of non-retrogression. This will bring together the discussions on the roots, construction and flaws of the existing retrogression with the proposals and critiques of the (re)constructed definition. In doing so, the chapter shows how the potential of the doctrine of non-retrogression is unrivalled. Although the importance of various other reforms and obligations are acknowledged, none provide the breadth of benefits that could come from a properly functioning doctrine of non-retrogression.

However, the chapter also goes a step further. It suggests areas of cross-applicability, where the findings might also have implications for the operation ICESCR and even the international human rights regime more broadly.

Before proceeding to chapter two and the examination of the historical context of the ICESCR and non-retrogression, a final note on the thesis' tone is needed. A consistent 'critical friend' approach is adopted. This responds to a view of the human rights literature which has, in general terms, been described as the product of 'uncritical proponents and uncritical critics'.[52] Like all generalisations, there are numerous and notable exceptions,

[52] Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 8.

however the description is often accurate. As such, a real attempt has been made here to avoid blind adherence to the human rights project and its norms (blind in the sense that context, alternative projects, or internal failures are missed or minimised). Likewise, real care has been taken in dealing with the tranche of (sometimes self-proclaimed) critique that puts forward forceful and often exciting arguments but which bears all too little relation to the legal position and instead attacks an (at least partly) hypothetical situation.

It is the argument of the thesis that non-retrogression's past is deeply confused, and its future will be beset with challenges. Neither of these features can be properly analysed through overly accepting or dismissive approaches (by being an 'uncritical proponent' or an 'uncritical critic'). The research presented here is an attempt to avoid both of these poles and to assess the doctrine of non-retrogression in the depth that it desperately needs.

Part I - (Re)constructing Purpose for Retrogression

Chapter 2

History

2.1. Introduction

Given the widespread familiarity with the ICESCR's controversial history, it seems an almost clichéd starting point. It has become accepted common ground that the system of IHRL has been infected by Cold War divisions, and a denigration of ESR. Yet, familiar as the story may be, there are good reasons for returning to it here.

Later in the thesis, the (re)purposing and (re)construction of non-retrogression are discussed in depth. Such *re*-constructions lack meaning without a base understanding of the original purpose and construction of the doctrine. Revisiting even the most well-established historical tenets is especially important as the doctrine was not created in one swift movement, but rather has had an incremental development. This process of development has added multiple layers and increasing complexity over time. These multiple points of development permit minor historical inaccuracies – normally unremarkable – to add up into a misleading picture. This demands an historical examination which can critically revisit key debates and which is capable of correcting such narrative inaccuracies. Without such a revisionist history, the danger is that the original purpose and construction of retrogression are wrongly understood, and that any reconstructions start with a faulty point of reference.

In particular, this chapter addresses some of the key circumstances that surrounded the negotiation of the international human rights machinery, the ICESCR, and the progressive realisation obligation. The doctrine's own identity touches on questions of the role of international human rights, the differences between ESR and CPR, and the construction and effectiveness of progressive realisation. An accurate understanding of these circumstances – achieved here through a revisionist history – is central to grasping what the doctrine of non-retrogression was meant to achieve, and how.

One example of how the revision of the traditional historical account changes our view of the doctrine relates to progressive realisation. Under the traditional narratives of Cold War division and the denigration and non-acceptance of retrogression, it is easy to see the progressive realisation obligation as a term of compromise. Seen in this way, the purpose and construction of retrogression appear as a remedy to State resistance and a politicised negotiation. However, if – as is advanced below – the history of the Covenants and the progressive realisation obligation is less contested and polarised than is generally thought,

retrogression appears differently. The doctrine is less of a response to the denigration of ESR, and its roots are elsewhere. This might mean its construction and purpose were the result of attempts by the CESCR to innovate, or – as the chapter argues in its penultimate section – as the result of an accidental creation by the CESCR.

To provide a better grounding for later discussions of relationships such as these, the following sections recount some of the history of the International Bill of Rights, the ICESCR, progressive realisation, the CESCR and the doctrine of non-retrogression. What follows is an undoubtedly partial account of the system-at-large, however the central focus are those historical aspects with pertinence to non-retrogression. Within the space available this restricted approach allows for more comprehensive treatment of those relevant features and a better understanding of non-retrogression.

Within this selective focus, the chapter sets the traditional narratives of the Cold War history of the system against the role of 'Third World' countries, and against ratification records. Revision of these two aspects respectively reveal a broader range of motivations behind the ICESCR, and the need for caution when examining the level of state buy-in to the Covenants. Further, the discussion below engages with some of the early controversies and difficulties that were built into the 'progressive realisation' obligation from the beginning. A final section builds upon these historical revisions, to find the beginnings of the doctrine of non-retrogression. This section is heavily contextualised to show the quite extreme challenges faced by the new CESCR at the point at which non-retrogression is said to have been created.

2.2. Historical Method

The approach taken to understanding the doctrine of non-retrogression in this chapter is an historical one. In adopting this approach, there are several departures from standard legal method and its (mis)use of historical materials. As such, a brief note on the historical method is needed.

Historical analyses done by lawyers have a bad reputation.[1] This reputation largely comes from the practice of lawyers who, in looking at series of past legal events, are often most interested in the 'net result of [an] evolution',[2] or the current understanding of an older legal development. Such an exercise can be to the detriment to a full *historical*

[1] Edward L Rubin, 'Law and and the Methodology of Law' [1997] Wisconsin Law Review 522, 522–523.

[2] John Phillip Reid, 'Law and History' (1993) 27 Loyola of Los Angeles Law Review 193, 195.

understanding of events, and is commonly referred to as 'law-office' history.[3] This is an unsurprising disciplinary trait given the continuing relevance of even very old jurisprudence. Further, despite the disapproval of historians, this pursuit does have value, particularly for the legal practitioner working to determine the current significance of a legal rule or development.[4] Yet, it is also clear that '[l]aw-office history is a legal practice, not a historical one'.[5]

Historical method goes much beyond a simple use of 'old' events in modern settings, and instead requires an attempt to understand the accompanying context of the events.[6] If there is to be a genuine commitment to understanding the history of the law as-it-happened, then the disciplinary cannons of 'history' must be adopted.[7] This includes 'let[ting] the past be the past',[8] reading sources as the 'contemporaries of the authors would',[9] and eschewing the 'premature use of universal [general] terms'.[10] Such an historical approach to the reconstruction of legal events, Lesaffer notes, 'ensure[s] that explanations are derived from the past and not dictated by the present'.[11] This is a rewarding methodological approach as it aids the legal scholar in understanding how and why a legal principle developed as it did.

In the context of the current study of non-retrogression there is a clear distinction between these two methodologies of law-office history and 'real' history. As noted above, these different inquiries have different aims and utilities. However, while law-office history offers an understanding of today's meaning of ICESCR doctrines, genuine historical methods offer an understanding of the significance of those doctrines at the time that they were developed.[12] This latter understanding is what is sought in this chapter. The historical interest here is not, as is commonly the case, an appeal to the authority that history can

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[3] ibid 197.

[4] Frederic William Maitland, 'Why the History of English Law Is Not Written' in Herbert Albert Laurens Fisher (ed), *The Collected Papers of Frederic William Maitland, vol. 1* (CUP 1911) 491; Randall Lesaffer, 'International Law and Its History: The Story of an Unrequited Love' in Matthew CR Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff Publishers 2007) 37.

[5] Mark Tushnet, 'Interdisciplinary Legal Scholarship: The Case of History-in-Law' (1996) 71 Chicago-Kent Law Review 909, 934.

[6] Reid (n 5) 194.

[7] Rubin (n 4) 522–523; In the absence of a genuine understanding by lawyers of historical techniques, it has been suggested that lawyers use the (familiar) rules of legal evidence in their historical analyses; Matthew J Festa, 'Applying a Usable Past: The Use of History in Law' (2008) 38 Seton Hall Law Review 538.

[8] Lesaffer (n 7) 37.

[9] ibid 38.

[10] Michael Moïssey Postan, 'History and the Social Sciences', *Fact and relevance: essays on historical method* (Cambridge University Press 1971) 19.

[11] Lesaffer (n 7) 40.

[12] Reid (n 5) 194; Of course, the gap between these two understandings is likely to be less severe the shorter a temporal distance there is between them. Understanding legal developments from 1217, for example, is an undoubtedly more complex task (as Geraldine Van Bueren does in 'Socio-Economic Rights and a Bill of Rights - an Overlooked British Tradition' [2013] Public Law 821, 825).

offer, but rather is a search for evidence on the meaning, conceptual basis and development of the doctrine of non-retrogression.[13]

Such an historical exercise has an additional practical function. There is a clear legal-interpretative utility in establishing the past context of ICESCR developments. The Vienna Convention on the Law of Treaties (VCLT) – despite favouring reliance on the text of treaties – allows for such historical factors to be used to interpreting the meaning of a treaty.[14] The requirement in the VCLT that the 'object and purpose' of international agreements can be used as an interpretative device demonstrates the persistence of such 'original intent' techniques.[15] Of course, the interpretation of treaties is not limited to the original intent of their drafters as 'object and purpose' interpretations allow for flexibility in accommodating the evolving object(s) and purpose(s) of the treaty.[16] However, the limited role that does exist for the object, purpose, and intent in determining the legal meaning of the treaty, means that the examination of the history and the *travaux is* all the more important. Such historical analyses of the ICESCR obligations, and of the doctrine of non-retrogression in particular, are capable of contributing not only to historical understanding, but also legal interpretation.

2.3. A Cold War History of the International Bill of Rights

The standard history of economic and social rights at the international level is one of division, subordination, and inferiority. Cold War influences are said to have permeated the preparation and drafting of the International Bill of Rights, causing the rights contained in the Universal Declaration of Human Rights[17] (UDHR) to be divided into separate (and unequal) treaties. Most scholars adopt and agree with this traditional narrative of ESR history, which emphasises the role of the Cold War in securing the dominance of CPR relative to ESR. It is often posited that, following the optimistic references[18] to 'human

[13] Reid (n 5) 193.

[14] Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference' (1969) 18 International & Comparative Law Quarterly 318, 325ff.

[15] *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980, 332 UNTS 1980) art 31(1).

[16] Jacobs (n 17) 320. However, much less flexibility is inherent in art 31(4) which requires that '[a] special meaning shall be given to a term if it is established that the parties so intended' (VCLT, art 31(1)). Additionally, in light of art 32 VCLT which notes that preparatory work and the context of the agreement's conclusion should be used only where an 'ambiguous' or 'manifestly absurd' interpretation would otherwise result, it is likely that art 31(4) on 'special meaning' will apply only where States parties have taken steps to agree a definition of terms.

[17] *Universal Declaration of Human Rights* (adopted 1948, UN Res A/810).

[18] Schabas' argues there was less cause for optimism even at this early stage, noting that human rights only received the attention they did in the Charter due to miscalculations from the US, UK and Russia and the consequent pressure from smaller nations. William Schabas (ed), *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013) lxxv.

rights run[ning] through the [UN] Charter like a golden thread',[19] the Cold War caused the thread to unravel into two distinct strands; ESR and CPR. Often the literature makes use of metaphors to indicate that due to the Cold War, ESR sit at a disadvantage to CPR. Thus, for example, ESR have been described as the 'poor cousins'[20] and 'poor relations'[21] of CPR, 'second-class' rights,[22] and a 'little sister'[23] to the ICCPR.[24] So pervasive is this view that the CESCR itself has noted the perception of the ICESCR as a 'poor relation' to its civil and political counterpart.[25]

Behind these descriptions is the claim that the West resisted the inclusion of ESR in the UDHR at an early stage.[26] The 'classic' CPR are argued to have fitted with the political traditions of Western nations, while the East found ESR more appealing. According to this account, these beginnings of division were exacerbated by the Cold War years that followed, with states taking 'extreme positions', and an 'objective consideration of the key issues' being precluded during that period.[27] It is claimed that states were polarised[28] by the conflict, and each bloc supposedly prioritised the covenant which best matched its ideological emphases.[29] Elements of the UN's work became mired in politicisation[30] and the formation and progress of the two international covenants slowed. Accordingly, the end of the Cold War purportedly brought a 'soothing cessation to the ideological rivalry that constrained and hindered human rights' and ushered in a new era for the neglected ICESCR.[31]

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[19] John Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 William and Mary Law Review 527, 527.

[20] Joint Committee on Human Rights, *International Covenant on Economic, Social and Cultural Rights, Twenty-First Report of Session 2003-04* (The Stationery Office 2004) para 163; Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1; Colm O'Cinneide, 'Bringing Socio-Economic Rights Back into the Mainstream' 1 <http://ssrn.com/abstract=1543127> accessed 9 October 2016.

[21] Matthew CR Craven, The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development (Clarendon Press ; Oxford University Press 1995) 9, 352.

[22] Mashood A Baderin and Robert McCorquodale, 'Introduction' in Mashood A Baderin and Robert McCorquodale (eds), *Economic, social and cultural rights in action* (Oxford University Press 2007) 10.

[23] Rachel Johnstone, 'Feminist Influences on the United Nations Human Rights Treaty Bodies' (2006) 28 Human Rights Quarterly 148, 150. There are, however, no references to the ICESCR as a 'little brother' to the stronger ICCPR.

[24] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171).

[25] CESCR, 'Report on the Sixth Session' (1992) UN Doc E/1992/23 para 362.; section repeated in CESCR, 'Report on the Seventh Session' (1993) UN Doc E/1993/22 para 2.

[26] Louis Henkin, *International Law: Politics and Values* (M Nijhoff 1995) 191.

[27] Philip Alston, 'Economic and Social Rights' (1994) 26 Studies in Transnational Legal Policy 137, 150.

[28] Alicia Ely Yamin, 'The Right to Health Under International Law and Its Relevance to the United States' (2005) 95 American Journal of Public Health 1156, 1156.

[29] Office of the United Nations High Commissioner for Human Rights, 'Frequently Asked Questions on Economic, Social and Cultural Rights (Fact Sheet 33)' (2008) 9.

[30] Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2013) 127, 138.

[31] Philip C Aka and Gloria J Browne, 'Education, Human Rights, and the Post-Cold War Era' (1998) 15 New York Law School Journal of Human Rights 421, 421; Office of the United Nations High Commissioner for Human Rights (n 33) 9.

2.4. Revised Histories of the International Bill of Rights

However, the past decade has seen a number of emerging – and valuable – revisionist histories which challenge the centrality of this Cold War narrative.[32] These range from histories which forefront 'struggle',[33] others which segment and shorten the history of human rights and the International Bill of Rights,[34] and still others which challenge directly the 'myth of Western opposition' to social rights.[35] These histories provide alternative, more compelling descriptions of the circumstances that surrounded the conclusion of the key IHRL instrument. This is central to resituating the doctrine as it shows up a different range of possible intentions and purposes.

These alternative histories have value in promoting an 'epistemological scepticism' as a route to unsettling dominant narratives or unlocking stagnant debates.[36] This general value of revisionism is applicable to the present research. Through revisiting key moments in history, the danger of situating – *ex post* – the doctrine of non-retrogression within a stagnant narrative is reduced. Instead it opens up opportunities to go beyond a descriptive account of the doctrine, its origins and a (narrow) account of its future. Rather, alternative histories open up questions that have broader relevance for the IHRL system as a whole, the ICESCR, and the doctrine. In blunt terms, rather than carving a hole for retrogression within debates that are settled (however unsatisfactorily), fractures in the dominant histories are used to show that retrogression's place within the ICESCR is as uncertain as it is for many other Covenant obligations. Given this aim, the extent of the historical revisiting below, can be (and is) limited. As the focus is on key fractures that open up new analytical opportunities, a comprehensive approach is not taken. Instead, what follows devotes most attention to two key revisions; the influence of 'Third World' states, and history as portrayed by the ratification records of the two Covenants.

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[32] For a summary of the purpose and boundaries of revisionist history see; Marnie Hughes-Warrington, *Revisionist Histories* (Routledge 2013) 8–18. For a critique see; Joseph V Femia, 'An Historicist Critique of "Revisionist" Methods for Studying the History of Ideas' (1981) 20 History and Theory 113.

[33] Christopher NJ Roberts, *The Contentious History of the International Bill of Human Rights* (Cambridge University Press 2014) for a snapshot of this position see 51–52.

[34] Samuel Moyn, *The Last Utopia* (Harvard University Press 2012).

[35] Daniel J Whelan and Jack Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29 Human Rights Quarterly 908.

[36] Santiago Juan-Navarro, *Archival Reflections: Postmodern Fiction of the Americas (self-Reflexivity, Historical Revisionism, Utopia)* (Bucknell University Press 2000) 195.

2.4.1. A History with 'Third World' Influence

When the traditional history of the international human rights system is told through Eastern and Western blocs, the contributions of those states that were onlookers to Cold War aggressions are minimized. Yet revisiting such 'Third World' contributions can be helpful in freeing the ICESCR from the economic and governance binaries is it assumed to sit between. In particular, it collapses the image of the ESR system as treading a path between endorsing a 'Western', small state, capitalist system and an 'Eastern', 'socialist', large state system, as the more effectual for the realization of rights. In several instances 'Third World' countries added another set of concerns, perspectives or priorities.

From the very earliest days of the UN's existence at the *San Francisco Conference on International Organisation*, Panama presented a text proposed as a single rights Covenant including CPR alongside ESR such as the rights to work, social security, food and housing.[37] Out of a clear desire to see the inclusion of a declaration of human rights in the UN Charter, the small Central American state repeatedly presented the document for discussion.[38] This draft text contained eighteen articles[39] and, according to the then Director of the UN Division on Human Rights, was the best of the range of working texts presented.[40] The strength of text presented by the Panamanian delegation was undoubtedly a function of it having been drawn from the earlier drafting processes of the American Law Institute (ALI).[41] That body had previously worked from 1941-1949 on a Statement of Essential Human Rights.[42] The Panamanian draft eventually failed to receive support in any of the committees in which it was presented. Having never been officially adopted by the ALI, opposition was likely from lawyers in the US,[43] and René Casin, the French representative, noted that it had been drafted in the western hemisphere and required broader input.[44]

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[37] Schabas (n 21) lxxvii. It included (in order) mention of freedom of religion, freedom of opinion, freedom of speech, freedom of assembly, freedom to form associations, freedom from wrongful interference, fair trial, freedom from arbitrary detention, retroactive laws, property rights, education, work, conditions of work, food and housing, social security, participation in government, and equal protection; 'Statement of Essential Human Rights Presented by the Delegation of Panama' (1946) UN Doc E/HR/3.

[38] In, eg, 'Commission on Human Rights Provisional Agenda' (1946) UN Doc E/HR/5.

[39] 'Statement of Essential Human Rights Presented by the Delegation of Panama' (n 41).

[40] John P Humphrey, *Human Rights & the United Nations: A Great Adventure* (Transnational Publishers 1984) 32.

[41] AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2004) 323. A project that was begun by Harvard Professor of tort law, Warren E Seavey, on a budget of just $15,000 (Hanne Hagtvedt Vik, 'Taming the States: The American Law Institute and the "Statement of Essential Human Rights"' (2012) 7 Journal of Global History 461, 463, 466).

[42] Jordon Steele, 'Statement of Essential Human Rights Project Records' (University of Pennsylvania 2011) <http://dla.library.upenn.edu/cocoon/dla/ead/ead.pdf?fq=creator_facet%3A%22American%20Law%20Institute%22%20AND%20date_facet%3A%221940s%22&id=EAD_upenn_biddle_USPULPULALI04006&> accessed 20 September 2016.

[43] Simpson (n 45) 323; Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals : Text and Materials* (Oxford University Press 2008) 271.

[44] Schabas (n 21) lxxx. Although this observation is likely correct, the objection ignores the efforts made by the ALI to survey the rights found in global constitutions and in international studies; Vik (n 45) 462, 468.

However, the similar scope of the Panamanian declaration to the final International Bill of Rights demonstrates that early acceptance of ESR alongside CPR was present.

Later in time, the influence of 'Third World' states was seen again when the ICESCR and ICCPR were being negotiated. Traditional Cold War division narratives have failed to acknowledge the influence of the development agendas of post-colonial states on the drafting of the Covenants.[45] Waltz is critical of the degree to which these Cold War analyses have 'obfuscated' understanding of the relevant politics.[46] Strikingly excluded from consideration are the non-aligned movement and the Bandung conference. Bandung represented a significant moment for Asian and African states described as an 'unprecedented and unrepeated moment of unity of purpose'.[47] At the 1955 gathering, Asian and African States declared that none of them should 'serve the particular interests of any of the big powers'.[48] Particularly averse to regionalism or ideological groupings, these new nation-states used the Bandung conference to underscore the importance of the inclusion of a broad range of ideological positions and the adoption of 'pragmatist' foreign policy.[49]

In addition the range of ESR was attractive to Third World states with rising development agendas, and for whom ESR held a political resonance.[50] These two factors – self-interest and non-alignment – resulted in the broad support of Third World states for ESR, but not for ideological division.[51] Acknowledging such influence – as well as being inherently valuable – allows for a reframing of the content of the ICESCR system to recognize it as being capable of holding *opportunity* for States.

2.4.2. A History Centring Ratification Records

Another area of the history of the IBoR deserves renewed attention. The Cold War narrative portrays a decisive split between East and West demonstrated in the blocs' divided loyalty to the ICESCR and the ICCPR respectively. However, as will be shown below, such a split is not reflected in the ratification records of the two Covenants. This small segment of a

[45] Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2011) 62.

[46] Susan Eileen Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 Human Rights Quarterly 44, 69.

[47] Jamie AC Mackie, *Bandung 1955: Non-Alignment and Afro-Asian Solidarity* (Didier Millet 2005) 2.

[48] 'Final Communiqué of the Asian-African Conference of Bandung' (1955) principle 6(a) <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 20 September 2016.

[49] Seng Tan and Amitav Acharya, *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (NUS Press 2008) 5.

[50] Susan Waltz, 'Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights' (2002) 23 Third World Quarterly 437, 444.

[51] Despite the efforts of Third World countries, the majority of these States perceive these rights to have been neglected in international human rights law; (Alston (n 31) 143.

revised history for the IBoR, has relevance for the understanding of the ICESCR and the current research on retrogression. A significant part of this relevance lies in the way in which the revisited history exposes the distance between States' formal acceptance of the ICESCR and their substantive acceptance or implementation of its terms. This, for retrogression and more generally, holds strategic lessons on where the greatest gains in protection are to be made and where a doctrine such as non-retrogression has the most potential.

States' formal acceptance of the two Covenants is easy to demonstrate. The equality with which the two sets of rights were treated is easily seen from the ratification records. The importance of such formal equality was keen felt by States throughout the drafting process, where the potential impacts upon ratifications of having a unified or divided covenant were frequently discussed. France, for example, in the Commission on Human Rights voiced concerns about the possibility of a neglected ESR treaty and the symbolic dangers of this prospect.[52] In the result, these concerns amounted to little with the ICESCR and the ICCPR entering into force within a few months of each other.[53] Analysis of the ratification records shows that States ratified the two Covenants in quick succession.[54] Indeed, States ratified the ICESCR an average of 51 days *before* the ICCPR. The proximity with which the two covenants were ratified can be seen in Figure 1 below, which shows how the vast majority of states (147 or 88%) ratified the ICCPR and ICESCR within a year of each other. Only a few outliers waited for a longer period before ratifying the second Covenant.

[52] 'Summary Record of the 248th Meeting of the International Law Commission' (1954) UN Doc E/CN.4/SR.248 17.

[53] The ICESCR entering into force on the 3 January 1976 and the ICCPR entering into force on the 23 March 1976 (only 80 days apart).

[54] Full calculations in Appendix C. Figures include all ratifications to the end of 2015.

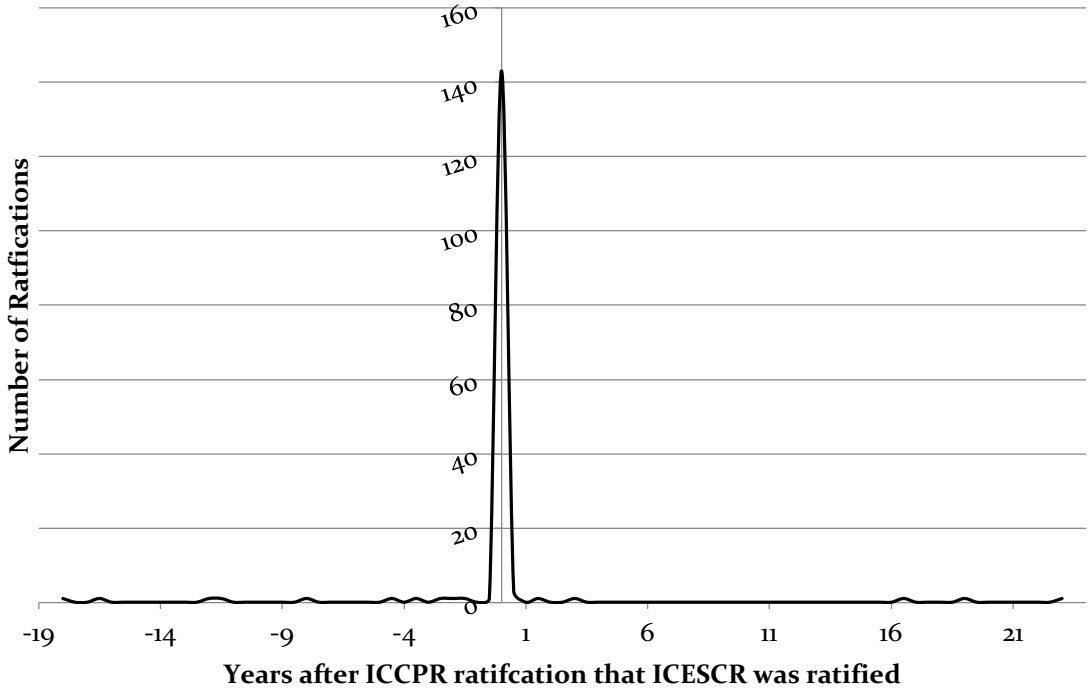

Figure 1

In addition, the trajectory of ratifications of the ICCPR and the ICESCR is almost identical.[55] When looking at the different accumulation of ratifications of the two Covenants, a similarly consistent picture emerges (figure 2). There are minor differences between the years of 1984 and 1990, where the ICESCR maintained a higher level of ratifications (around 5 more). This marginal trend is reversed from 1996 to the present, with the ICCPR maintaining between one and five ratifications more than the ICESCR. The trend of the ICESCR and the ICCPR being ratified at similar rates remains true for states in the Western bloc.[56] Such a willingness by states to ratify both Covenants at almost the same rate would seem to refute claims that states had an aversion to undertaking formal ESR commitments.

[55] Full calculations in Appendix C. Figures correct as at 20 September 2016.

[56] Roughly approximated as those States in NATO during the Cold War (with the exception of the ratifications of West Germany); John W Young, *The Longman Companion to Cold War and Detente, 1941-91* (Longman 1993) 198–200.

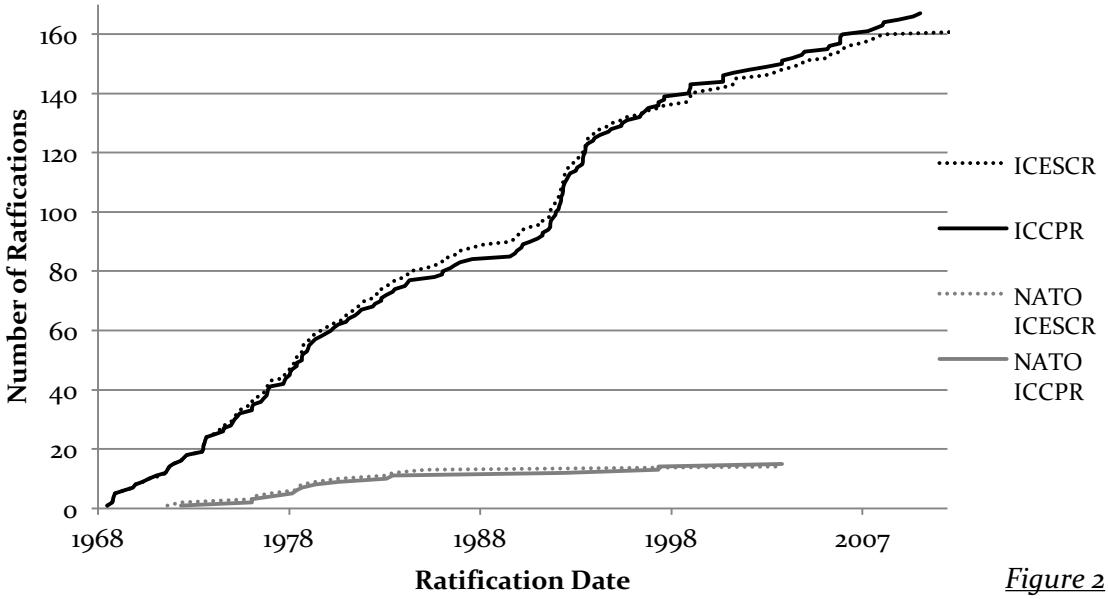

Figure 2

Overall, the pattern of ratifications is remarkably similar and would not support any assertion that disagreements over the substance of the treaties were significantly reflected in the levels of ratification. A narrative of Cold War ideological division cannot account for such similar ratification patterns. Neither can Cold War differences satisfactorily account for the continuing neglect of ESR. The Cold War ended in 1989 with the collapse of communism in eastern Europe,[57] yet in the years since there has been no radical surge in support for ESR.[58] If, as the current textbook version of events has it, ESR were neglected by the West as a tool in an ideological war it would be reasonable to expect a reversal of this position when the wounds of war had healed. There is little or no evidence of this.

It is, perhaps, notable that regardless of the large and equal numbers of ratifications to the Covenants, the US remained stubbornly accepting of only the ICCPR. Although it signed the ICESCR shortly after it entered into force,[59] it is possible that the narrative of division between the two Covenants was reinforced not by the number of States which resisted ESR (which was relatively small), but by the influence of those which did.

However, what the ratification records do not convey is the degree to which States substantively accepted the contents of the ICESCR. The whole question of whether, when and why States act upon their international human rights obligations is a complex – and

[57] ibid 152.

[58] The low level of ratifications for the complaints mechanism support this assertion. Its 21 ratifications (as at 20 September 2016) is very similar to the number of parties to the complaints mechanism of the CRC, but is a much lower number than the complaints mechanism for the CEDAW (56) collected in a similar period; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013, UN Res A/RES/63/117). The ratification records for the ICESCR itself also demonstrate this contention. See Appendix C.

[59] The US signed the ICESCR on 5 October 1977 (just over a year and a half after the Covenant had entered into force).

highly interesting – one.[60] Without entering into those debates, one observation is important for the current research. It seems likely that mechanisms such as progressive realization were included in the ICESCR not (or not only) to improve the operational effectiveness of the Covenant, but also to soften the obligations to ensure State buy-in.[61] However, hindsight indicates that while there was formal buy-in in the form of ratification, the inclusion of the progressivity condition perhaps did less to ensure that there was substantive acceptance. Indeed, the inclusion of the progressive realisation condition may have been counterproductive in this respect, facilitating the undermining of ESR during and since the Cold War. Beyond underscoring the importance of separating out formal and substantive State actions in assessments of the ICESCR's success, this also demonstrates that deference to States should have deep justifications that go beyond maintaining the formal acquiescence of national delegations.

2.5. Development of 'Progressive Realisation'

The obligation to achieve progressively the full realization of the ICESCR rights found in article 2(1) of the ICESCR has a particular relevance both in terms of an historical account of the Covenant, and in terms of analysis of the doctrine of non-retrogression. The obligation (known as the obligation of 'progressive realisation') applies in conjunction with the substantive provisions such as the rights to work, social security, an adequate standard of living, health, education, and culture, which are listed in Part III of the ICESCR. The adopted text of Article 2(1) reads in full;

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights recognized in the present Covenant* by all appropriate means, including particularly the adoption of legislative measures.[62]

With the strong link that is often claimed between retrogression and progressive realisation, understanding the nature of that relationship is crucial to later attempts to (re)construct the doctrine

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[60] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935; Samuel Moyn, 'Do Human Rights Treaties Make Enough of a Difference?' in Conor Gearty and Costas Douzinas (eds), *Cambridge Companion to Human Rights Law* (Cambridge University Press 2012); Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) especially chapters 5, 9; Emilie M Hafner-Burton and James Ron, 'Human Rights Institutions: Rhetoric and Efficacy' (2007) 44 Journal of Peace Research 379; Emilie Marie Hafner-Burton, Brad L LeVeck and David G Victor, 'How Activists Perceive the Utility of International Law' [2015] SSRN <http://papers.ssrn.com/abstract=2685381> accessed 20 September 2016.

[61] 'Summary Record of the 248th Meeting of the International Law Commission' (n 56) 17.

[62] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) art 2(1) (emphasis added).

The formulation of progressive realisation was arrived at relatively early in the drafting process and was substantially settled by 1951.[63] At this point, many other obligations were still some distance from their final form.[64] Despite the level of attention that it has had in more recent times, the idea of progressivity itself was a relatively uncontroversial one.[65] Debates tended to centre on the words that would accompany 'progressive' in order to ensure an adequate and realistic rate of realisation.[66] However, on the word itself there was reasonable consensus.[67] The ease with which this formulation was settled on may be partly thanks to the inclusion of the idea of 'progressive measures' in the Universal Declaration of Human Rights.[68]

The text of the comparator provisions in the ICCPR differs markedly.[69] While the ICESCR focusses more on the practical undertakings of States 'to take steps…with a view to achieving progressively', the ICCPR first provides something of a meta-objective for the Covenant, requiring that States 'respect' and 'ensure' rights,[70] before going on to list the ways in which States should do so. Having a meta or background value is important, as is argued further below,[71] as an additional interpretative tool and guiding standard where the obligations are unclear.

The immediacy of the ICCPR is often counter-posed to the progressiveness of the ICESCR.[72] However, any such distinction must also be qualified by noting the immediate obligations within the ICESCR.[73] In addition, away from the headline general obligations, both of the Covenants use remarkably similar terms when requiring States to report to supervisory mechanisms. Both require States to submit updates on the 'progress' made in the implementation of the rights.[74] The inclusion of such a condition in the ICCPR is somewhat

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[63] The phrase 'international assistance and co-operation, especially economic and technical' had, however, originally only read 'international co-operation'; Commission on Human Rights (n 2) para 23.

[64] Secretary General, *Activities of the United Nations and of the Specialized Agencies in the Field of Economic, Social and Cultural Rights* (UN Doc E/CN4/364/Rev.l 1952) Appendix, 69.

[65] Third Committee of the General Assembly, *Agenda Item 43* (n 2) paras 10, 14, 21, 34, 48.

[66] Commission on Human Rights (n 2) 16; Third Committee of the General Assembly, *Draft International Covenants on Human Rights* (n 2) para 40; Third Committee of the General Assembly, *Agenda Item 43* (n 2) para 34.

[67] Commission on Human Rights (n 2) para 28.

[68] *Universal Declaration of Human Rights* (n 20) preamble.

[69] See Table 1.

[70] These terms provided an overall purpose for the Covenant long before Shue gave them a more closely defined meaning; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1st edn, Princeton University Press 1980).

[71] See Chapter 3, p93.

[72] Manisuli Ssenyonjo, 'Economic, Social and Cultural Rights' in Mashood A Baderin and Manisul Ssenjoyonjo (eds), *International Human Rights Law: Six Decades After the UDHR and Beyond* (Routledge 2016) 59.

[73] M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 128ff. See, eg, the obligation of non-discrimination or the minimum core obligation.

[74] *International Covenant on Civil and Political Rights* (n 28) art 40(1); *International Covenant on Economic, Social and Cultural Rights* (n 65) art 16.

contradictory given that the treaty's requirement of immediate realisation of the rights is antithetical to a 'progress' update.[75]

	ICCPR	**ICESCR**
Nature of State undertaking	… *undertakes to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…[76]	… *undertakes to take steps*, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization* of the rights recognized in the present Covenant..[77]
Nature of implementation measures required	Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the *necessary steps, in accordance with its constitutional processes* and with the provisions of the present Covenant, to *adopt such laws or other measures as may be necessary* to give effect to the rights recognized in the present Covenant.[78]	… by *all appropriate means, including particularly the adoption of legislative measures*.[79]

Table 1

A final point of note is the manner in which the ICCPR assumes that States are already in partial compliance with the Covenant standards. The subsection's opening phrase '[w]here not already provided for' is absent from the ICESCR, and indicates the extent to which the ICCPR was seen as the international codification of existing domestic CPR standards.

Notwithstanding these differences in approach, the two texts were considered together during the drafting process.[80] The sometimes-marked variances are commonly attributed to the accommodation of the 'realities of the real world' implying there are more

[75] See *contra* Nowak, who argues that the art 40 'progress' provision is correctly read to require information on progress which is above and beyond what is legally required by the ICCPR; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 62.

[76] *International Covenant on Civil and Political Rights* (n 28) art 2(1).

[77] *International Covenant on Economic, Social and Cultural Rights* (n 65) art 2(1) (emphasis added).

[78] *International Covenant on Civil and Political Rights* (n 28) art 2(2).

[79] *International Covenant on Economic, Social and Cultural Rights* (n 65) art 2(1) (emphasis added).

[80] Saul, Kinley and Mowbray (n 24) 134.

implementation difficulties with ESR and a greater need for flexibility.[81] Indeed the progressive realisation obligation (and the Covenant with it) has frequently been characterised as 'flexible'.[82] The CESCR itself has termed the obligation a 'necessary flexibility device'.[83]

However often article 2(1) has been described as flexible, its drafters' intent and its construction do not inevitably lend themselves to this conclusion. The provision requires that each State takes steps 'to the maximum of its available resources, with a view to achieving progressively' the ICESCR rights.[84] Rather than a more open requirement that States progress towards full realisation, the Covenant stipulates that progress must occur at the rate that resources allow. As such, the only respect in which the condition of progressive realisation can accurately be said to differ to its CPR counterpart is in its acknowledgement of – but not flexibility towards – the limitations that a State's maximum of available resources can impose. The article constitutes an acknowledgement of, but not a flexibility towards, resource constraints as it sets down in clear and unyielding terms that States must realise the ICESCR rights where its resources allow. Likewise, the temporal flexibility that is often said to exist in article 2(1) is overstated;[85] a longer timeline for the realisation of ESR being permissible only where resource constraints require it.

Practically speaking, such an acknowledgement of the 'realities of the real word' would also be beneficial to the ICCPR. CPR are clearly capable of having resource implications.[86] Yet, with its harsh 'implement immediately or violate' construction, States could be found to be infringing the ICCPR even if non-implementation was due to resource constraints. Such a scenario could easily arise where a State's prison system was in such a poor condition that it was in violation of the right to be free from 'cruel, inhuman or degrading treatment or punishment'.[87] It is possible that the ICCPR accounts for such resource limitations, but in a less transparent manner.

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[81] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art. 2, Para. 1 of the Covenant)* (UN Doc E/1991/23 1990) para 9.

[82] Lillian Chenwi, 'Unpacking" Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 De Jure 742, 744. See also n66 above.

[83] CESCR, *General Comment 3* (n 83) para 9.

[84] *International Covenant on Economic, Social and Cultural Rights* (n 65) art 2(1).

[85] CESCR, *General Comment 3* (n 83) para 9. Although a temporal dimension was indeed discussed during the drafting with the options of 'rapid' or 'accelerated' progressive realisation mooted, similar discussions were had in respect of the ICCPR; Saul, Kinley and Mowbray (n 24) 134; Nowak (n 81) 31–32.

[86] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 172. For example, the resources required to maintain conditions of imprisonment above an inhuman and degrading standard, or the costs implicit in providing for fair trials.

[87] *International Covenant on Civil and Political Rights* (n 28) art 7.

This acknowledgement of the genuine limitations that resource constraints can place upon State implementation of rights, raises the question of which other 'realities' might have been acknowledged. For example, States may face genuine difficulties in generating effective policies, or be impeded, despite their best education and promotion efforts, by a slow rate of social change.[88]

The Third Committee of the General Assembly, during its discussions of the two Covenants, showed an awareness of how such constraints upon States may create a fictional divide between what States are legally bound to do and what they have the capacity to achieve. This concern was most prominent with respect to the ICCPR where some argued for the '*almost* immediate' application of the Covenant to allow States to adjust constitutional arrangements where necessary.[89]

In its drafting and construction it is clear that the obligation of progressive realisation does not,[90] nor was it intended to,[91] release States from meaningful obligations. Neither, as has been discussed above, is it flexible in what it requires of States.

However, despite the clear obligation set down by the article, the monitoring of it is much more challenging.[92] The idea of progression requires a comparator point in order to establish what progress has been made. This requires good quality data that is free from State or other biases, collected according to a scientific methodology, and with consistency so that data points can be compared across time. At the same time, qualifying the obligation with respect to the maximum of available resources requires a complex assessment of the resources available to the State and the manner in which they have been expended. Understandably perhaps then, the obligation has faced severe criticism, uncertainty, and a search for ways in which it might be supplemented or improved.

2.6. The Beginnings of 'Retrogressive Measures'

The genesis of non-retrogression can be found in the CESCR's General Comment 3. There, in just a sentence, an idea and a word was introduced that would develop into something significantly more important. Yet, there is little in the years leading up to the drafting of

[88] Difficulties that were somewhat acknowledged during the drafting process; Third Committee of the General Assembly, *Agenda Item 43* (n 2) para 25.

[89] ibid para 23 (emphasis added).

[90] CESCR, *General Comment 3* (n 83) para 9.

[91] However it has been noted that while the divergence from the language of the ICCPR was indeed deliberate, the full consequences of this may not have been understood; Saul, Kinley and Mowbray (n 24) 134.

[92] This is further discussed below at Chapter 3, pp80-94.

General Comment 3 to suggest that the Committee at that time was attempting to generate a substantially new doctrine in that fifth session. In fact, the opposite may be true. Those early days of the doctrine of non-retrogression are addressed below, first in terms of the institutional issues that afflicted the Committee during that period and, second in relation to its performance and priorities in the preceding years.

2.6.1. Institutional Factors

The CESCR itself was established some nine years after the entry into force of the ICESCR and following a series of failed attempts by the Economic and Social Council (ECOSOC) to monitor States' compliance with the Covenant obligations. One of these attempts was an initial Sessional Working Group that was established in 1976[93] and began work in 1979.[94] The function of that Group was then modified to a greater or lesser extent in 1978, 1979, 1981, 1982, 1983, and 1984 before being disbanded in favour of the new CESCR arrangement in 1985.[95] Two years after having been disbanded, the results of the Working Group's efforts were dismissed as 'patently inadequate' by two members of the new CESCR.[96]

This left the newly formed CESCR in a position of precariousness. It had long been argued that a reformed monitoring system was needed for the ICESCR and the Committee was seen as a 'last ditch' attempt.[97] There was, therefore, a degree of pressure upon the new CESCR to reform an 'under fire' and dysfunctional system of reporting [98] and to begin the process of effectively monitoring State compliance.[99] Whether as a result of such pressures, or contributing to them, some instability is evident in the early work of the Committee. Committee members, Alston and Simma describe the threat posed to the CESCR by

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[93] By ECOSOC, *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (ECOSOC Res 1985/17 1976).

[94] Philip Alston and Bruno Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' (1987) 81 The American Journal of International Law 747, 748.

[95] The CESCR held its first session in 1987. CESCR, 'Report on the First Session' UN Doc E/1987/28; Alston and Simma (n 97) 748–9.

[96] Alston and Simma (n 97) 748. Another year later the pair reflected that the CESCR was progressing away from the 'sterile formalism' of previous efforts (Philip Alston and Bruno Simma, 'Second Session of the UN Committee on Economic, Social and Cultural Rights' (1988) 82 The American Journal of International Law 603, 604.), while the CESCR noted that there was no 'reliable or complete picture' of the realization of ESR despite the '124 initial reports and 44 second periodic reports' that had been examined (CESCR, 'Report on the Second Session' UN Doc E/1988/14 para 368). Alston noted elsewhere that the new committee would have to 'overcome the inheritance' of the Working Group that had a 'rather discouraging track record' (Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 332, 333.).

[97] Alston (n 99) 335ff.

[98] ibid 332.

[99] The gender (im)balance within the Committee might also have added to this list of pressures, with 16 of the 18 members of the first CESCR being male. See CESCR, 'Report on the First Session' UN Doc E/1987/28 60.

overtones of politicisation during the first session.[100] Similarly, the problem of limited time[101] (and connected concerns of limited financial resources[102]), and a lingering uncertainty as to the degree of independence that the ECOSOC parent body would afford to the CESCR all contributed to a sense of instability.[103] The reports of the Committee's activities reflect similar uncertainties.[104] Indeed, it is arguable that this atmosphere contributed to a lack of confidence that continued for years into the CESCR's existence, with the Committee remaining undecided on its 'own appropriate role amidst the rapid global changes' until at least 1992.[105]

With regard to the drafting of General Comments, uncertainty also existed. The decision to adopt General Comments similar to those of the Human Rights Committee[106] was made at the second session of the Committee in 1987 following an invitation from ECOSOC.[107] The third session saw a General Comment on 'Reporting by States parties' adopted, while a Comment on 'International technical assistance measures' was adopted at the fourth session. Despite being adopted within a year of each other, these two comments vary markedly in their format and style. Neither Comment addresses particularly substantive issues of Covenant rights. There was some consideration of the broad purposes of, and procedures for, adopting General Comments.[108] However, unlike the detailed directions for adopting State Reports there was no comprehensive guidance as to what a General Comment should contain.[109] Indeed, the most consistent rationale given by the CESCR for the adoption of General Comments was the desire to draw upon the accumulated experience of the Committee.[110] In introducing the idea of General Comments, the sessional reports reflect emphases on continuity (repeatedly referencing the large number of reports that had been examined) and on plurality of experience being incorporated (there had been State reports from 'all regions of the world, with different socio-economic, cultural, political

[100] Alston and Simma (n 99) 604, 615. Of course, their perspective is one of many – no doubt other Committee members would have expressed the threat somewhat differently. The point here is not to conclusively ascertain what the threats to the Committee were, but instead to highlight the instability that existed.

[101] Alston and Simma (n 97) 751, 754.

[102] ibid 754–5.

[103] ibid 755–6.

[104] Matthew Craven and Caroline Dommen, 'Making Room for Substance: Fifth Session of the Committee on Economic, Social and Cultural Rights' (1991) 9 Netherlands Quarterly of Human Rights 83, 89.

[105] CESCR, 'Report on the Sixth Session' UN Doc E/1992/23 para 332.

[106] The Human Rights Committee being the equivalent body that supervises the implementation of the ICCPR. That Committee had adopted fifteen General Comments at this point, but it would be misleading to say that these Comments provided any extensive guidance to the CESCR, as fourteen of that number had been very short and lacked detail.

[107] CESCR, 'Report on the Second Session' (n 99) 366–7.

[108] ibid 366–70.

[109] Annex IV: Revised guidelines regarding the form and contents of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights in 'Report on the Fifth Session' UN Doc E/1991/23.

[110] CESCR, 'Report on the Second Session' (n 99) 168–9. This recounting of the 'extensive experience' of the Committee is also present in CESCR, *General Comment 3* (n 83) 10.

and legal systems').[111] Such factors point toward the introduction of General Comments as a development of procedure aimed at clarifying rather than as a mechanism to implement substantive innovations.

Given the desire to reassure States of the appropriateness of General Comments and in the context of a temporary and fragile history, it is unlikely the Committee would have sought to introduce any substantial innovation. That the Committee intended to develop a doctrine of non-retrogression in what was their first fully substantive General Comment therefore is doubtful.[112] This prospect seems even more unlikely given the significant implications that could result. As a general obligation of the Covenant, the Committee altering (or elaborating upon) the obligation of progressive realisation would mean altering an obligation that applied in combination with all ICESCR rights.[113]

2.6.2. Track Record

If the institutional history of the CESCR makes it unlikely that there was a drive to innovate a new doctrine of retrogression, the context of its engagement with the notion of progressive realisation makes it even more unlikely. A clear understanding of the obligation of progressive realisation, as the central general obligation of the ICESCR, was (and remains) crucial to the interpretation of the Covenant. In the examination of State reports prior to General Comment 3, there had been clear difficulties in subjecting States' progress to any kind of sustained or rigorous analysis.[114] The term 'progressive' was used infrequently in the early sessions of the Committee and generally the early approach of the Committee entailed looking for some minimal evidence of 'progress'. The amount, speed, or effectiveness of progress is rarely examined in early State reports. Even with the modest aim of giving a rough assessment of 'progress', the CESCR was inconsistent in its approach and struggled to make sense of the limited information provided by States.

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[111] CESCR, 'Report on the Second Session' (n 99) 368.

[112] The Committee member that drafted General Comment 3 and put it forward for consideration and amendment was Philip Alston. (CESCR, 'Report on the Fifth Session' (n 19) 255). Three years earlier Alston had reflected that a long road lay ahead of the CESCR and, when it came to institutions at least, there is 'not just…the need for, but even the desirability of, a slow but steady evolutionary development'. (Alston (n 99) 334.) Neither does an obvious mention of the concept of retrogression appear in his academic work (including the encyclopaedic, Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156; or Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals : Text and Materials* (Oxford University Press 2008)).

[113] Sepúlveda (n 79) 320.

[114] In this connection, Alston and Simma were critical of the practice of States' 'frequent practice of cramming the reports with descriptive and statistical information that is unfocussed, unrefined and generally meaningless in terms of facilitating any sort of temporal, spatial or distributional comparisons'. (Alston and Simma (n 99) 750.)

In one bizarre example, in concluding remarks on the report of the Byelorussian Soviet Socialist Republic, the CESCR 'noted the substantial progress made' before continuing to observe that 'the report contained very few meaningful statistics which would have enabled an evaluation to be made of the status of economic and social rights'.[115] In respect of Cameroon, the CESCR noted it was unable to make an assessment as to 'progress' as there was a lack of statistical and other data provided.[116] Neither did the 'snapshot' of the position of ESR given by the United Kingdom's report, according to the CESCR, provide an adequate explanation of the progression of rights enjoyment.[117] Presumably, in an effort to address these information absences and to better monitor the obligation of progressive realization, a number of new requirements were introduced in General Comment 1. The text of that Comment makes recommendations aimed at improving the evaluation, monitoring, and planning for progressive realisation.[118] In addition the detailed guidance on the format of State reports was substantially revised at the fifth session.[119]

Although these amendments to procedures are significant for monitoring purposes, they do little to add to the normative content of the progressive realisation obligation. As such, General Comment 3 can be seen as the CESCR's first attempt to inject a degree of content and clarity into this important State duty. Indeed, this is how two contemporaneous commentators saw the General Comment.[120] In this context, it is difficult to see any rationale for adding – in the form of a new doctrine to govern backwards steps – further and novel complexity to the already problematic progressive realisation concept.

Rather, in respect of progressive realisation, it seems more likely that the General Comment is a straightforwardly expanded version of the standards set down in the Limburg Principles four years earlier.[121] Those Limburg Principles contained no mention of retrogression, or any conceptual consideration of backwards steps, and the CESCR was clearly cognisant of these principles, citing them in a following session.[122] It would seem unlikely that a

[115] CESCR, 'Report on the Second Session' (n 99) 157.

[116] CESCR, 'Report on the Third Session' UN Doc E/1989/22 para 38. Similar concerns arose in relation to Ecuador; CESCR, 'Report on the Fifth Session' (n 112) 157.

[117] CESCR, 'Report on the Third Session' (n 119) 265.

[118] CESCR, *General Comment 1 : Reporting by States Parties* (UN Doc E/1989/22 2008).

[119] CESCR, 'Report on the Fifth Session' (n 112) Annex IV.

[120] Craven and Dommen (n 107) 92. Of course, although the development of the progressive realization obligation has been tracked here, General Comment 3 also deals with other important terms of the ICESCR, including on non-discrimination, immediate obligations, and remedial measures.

[121] 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Document E/CN.4/1987/17 ss 16–28.

[122] CESCR, 'Report on the Seventh Session' (n 29) Annex IV, para 43.

Committee invested in developing a coherent and clear obligation of progressive realisation, would stray too far from those highly important and influential guidelines.[123]

Given the analysis above, it would seem that the initial introduction of the phrase 'retrogressive measures' into the vocabulary of the CESCR and its General Comments was not intended to develop a new head of obligation. This is a significant but, perhaps given the context, unsurprising finding. It points to a need for caution when making the claim that a legal innovation has resulted from the CESCR's General Comment 3 work.

One of the most important implications of such an accidental development of the doctrine – as opposed to a new description of an old obligation – relates to the search for a conceptual basis for the doctrine. If the doctrine was created accidentally, the Committee could simply not have paid any attention to conceptual (or even textual) bases for a doctrine that governed backwards steps. This means that modern attempts to find a conceptual basis for the doctrine that dates back to the ICESCR or General Comment 3, overreach the CESCR's own intentions and are a highly retrospective and somewhat artificial exercise. These more conceptual issues are addressed in the following chapter.

2.7. Conclusions

The chapter began by promising the rewards of an historical method in understanding the development of the doctrine of non-retrogression. In two key respects, the development of the International Bill of Rights, and the ICESCR within it, has been shown to have had a more complex history than is often portrayed. The chapter sought to move beyond blunt acceptance of the Cold War narrative to show that there is more to the story of ESR. Through a foregrounding of 'Third World' influence and measures of States' formal acceptance of the Covenants, the importance of such an alternative account was highlighted. In assessing the roots and debate surrounding progressive realisation, further historical revisions were suggested to enable a more nuanced, less polarised account of the obligation.

The chapter ended by arguing that the CESCR had no intention of introducing a new doctrine. This is highly significant as it shows how the fragility of the doctrine's conceptual basis was built in from the beginning. This conclusion about the origins of the doctrine is

[123] Indeed, one author notes that the CESCR was 'inspired' by the Limburg principles in its early years. Felipe Gómez Isa, 'The Reversibility of Economic, Social and Cultural Rights in Crisis Contexts' in Eider Muniategi Azkona and Lina Klemkaite (eds), *Local Initiatives to the Global Financial Crisis: Looking for Alternatives to the Current Socio-Economic Scenario* (Universidad de Deusto 2012) 35.

based on attention to the earliest days of the CESCR; its position, the threats to the new body, and the priorities for it. Seeing non-retrogression less as a conceptual development and more as the introduction of a new word to describe a violation of progressive realisation, is an important finding that is returned to in the following chapter. Crucially, this conclusion on the accidental creation of the doctrine also begins to show the need for a thought-out (re)purposing and (re)construction.

As well as providing vital context on the position of ESR within the international sphere, the exploration of the ICESCR's history showed a more diverse range of motivations for the conclusion of the Covenants, and greater levels of consensus – at least at the formal level. This, and the early history of non-retrogression, demonstrate the fragile conceptual and legal ground on which the doctrine rests. These conceptual and legal questions form the substance of the following chapter.

Chapter 3

The Fragmentation of Retrogression

3.1. Introduction

While the thesis claims to be concerned with 'the' doctrine of non-retrogression, describing the doctrine as such masks the multiple versions of it that have been promulgated by the CESCR. The doctrine has developed greatly in its meanings since the initial inclusion of the word 'retrogressive' in General Comment 3 in 1990. Eleven General Comments,[1] several other statements from the CESCR,[2] use by various Special Procedures,[3] and use in academic[4] and advocacy contexts[5] has developed an intricate picture of the doctrine and its meaning.

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[1] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) para 9; CESCR, *General Comment 13: The Right to Education (Art 13 of the Covenant)* (UN Doc E/C12/1999/10 1999) para 13; CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 32; CESCR, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (UN Doc E/C12/2002/11 2002) para 19; CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)* (UN Doc E/C12/2005/4 2005) para 42; CESCR, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15(1)(c) of the Covenant)* (UN Doc E/C12/GC/17 2006) para 27; CESCR, *General Comment 18: The Right to Work (Art 6 of the Covenant)* (UN Doc E/C12/GC/18 2005) para 21; CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 42; CESCR, *General Comment 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a) of the Covenant)* (UN Doc E/C12/GC/21 2001) para 65; CESCR, *General Comment 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)* (UN Doc E/C12/GC/22 2016) para 38; CESCR, *General Comment 23: The Right to Just and Favourable Conditions of Work (Art 7 of the Covenant)* (UN Doc E/C12/GC/23 2016) para 52. See also a timeline of these and other interventions at Appendix A. The criteria within each are listed in Appendix B.

[2] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 paras 9–10; Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW; CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (UN Doc E/C12/2016/1 2016) para 4.

[3] Including by mandate holders as diverse as the Special Rapporteur on the right to health, the Independent Expert on the effects of foreign debt, the Special Rapporteur on adequate housing, the Special Rapporteur on the right to food, the Special Rapporteur on contemporary forms of slavery, the Special Rapporteur on the human right to safe drinking water and sanitation, and the Special Rapporteur on extreme poverty and human rights; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Mission to the Syrian Arab Republic* (UN Doc A/HRC/17/25/Add3 2011) para 14; Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights, *Reports on Three Multi-Stake Holder Consultations on the Draft General Guidelines on Foreign Debt and Human Rights Held in 2010* (UN Doc A/HRC/17/37 2011) para 89; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *Mission to Indonesia* (UN Doc A/HRC/25/54 2013) para 8; Special Rapporteur on the Right to Food, *The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food : Moving from Charity to Obligation* (UN Doc A/HRC/10/5 2009) para 41; Special Rapporteur on contemporary forms of slavery, including its causes and consequences, *Summary of Activities* (UN Doc A/HRC/27/53 2014) para 23; Special Rapporteur on the human right to safe drinking water and sanitation, *Common Violations of the Human Rights to Water and Sanitation* (UN Doc A/HRC/27/55 2014) para 46; Special Rapporteur on extreme poverty and human rights, *Fiscal Policy and Taxation Policies* (UN Doc A/HRC/26/28 2014) para 28.

[4] Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights* (Hart 2013) 41; Aoife Nolan, Nicholas J Lusiani and Christian Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 121; M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 319–322; Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) European Law Journal 521, 540–1; Radhika Balakrishnan and Diane Elson, *Economic Policy and Human Rights: Holding Governments to Account* (Zed Books 2011) 8, 28; Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014) 70ff; Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12(2) Human Rights Law Review 221, 252–3; Diane Elson, 'The Reduction of the UK Budget Deficit: A Human Rights Perspective' (2012) 26(2) International Review of Applied Economics 177, 180–182; Murray Wesson, 'Social Condition and Social Rights' (2006) 69 Saskatchewan Law Review 107, 115–116.

[5] Particularly in the work of the Center for Economic and Social Rights; Center for Economic and Social Rights (CESR), 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (2012)

This chapter undertakes two parallel and complementary tasks. One of these is to counteract the view that has prevailed of the doctrine as a single entity. The chapter divides and complicates this picture, showing a range of directions and approaches that have been taken. This is an important prerequisite to the second task of searching for the doctrine's *core*, and particularly its core purpose. With a better understanding of what the doctrine is, and what it is intended to achieve, the thesis can move on to engaging with these functions.

These sources of the doctrine's development, both within and beyond the CESCR, are discussed below and are acknowledged as having contributed to a well-developed and highly important doctrine. Terminology has also been an important shaper of the doctrine and Section 3.2.1. below highlights this role. However, in seeking to understand what the core of the doctrine is, the bulk of the chapter focuses on the more substantive question of the doctrine's formation.

The doctrine of non-retrogression is formed of a prima facie prohibition[6] on 'retrogressive' measures and a number of criteria which, if satisfied, can nonetheless pass a measure as 'permissible' retrogression. It is this latter part of the doctrine – the criteria specifying when retrogression is permissible – that has evolved over time. This aspect of the doctrine can be classed into distinct versions (nine in total) and each of these versions requires careful analysis in order to understand its implications and how it affects the doctrine and ESR holistically.

Although there are nine versions of the doctrine of non-retrogression, these can be coherently grouped into four of what I have called 'conceptual models'. These models are used as analytical frames to categorise and distinguish the phases of retrogression. Each of these conceptual models seeks to highlight the position of the doctrine of non-retrogression relative to the ICESCR. By grouping the doctrine into four models, there is a sense of discontinuity injected into the consideration of the doctrine. This discontinuity is important to the chapter's first task of complicating and counteracting the 'single doctrine' view. It allows the analysis to effectively draw attention to both the minor evolutions (differences in the doctrine's criteria) and the major developments (differences in the doctrine's legal basis). With the developments and evolutions (i.e. the discontinuities)

<http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf> accessed 20 September 2016; Center for Economic and Social Rights (CESR), 'Spain: Visualizing Rights' (2012) <http://www.cesr.org/downloads/FACTSHEET_Spain_2015_web.pdf> accessed 20 September 2016; Center for Economic and Social Rights (CESR), *Egypt: Factsheet* (2013) <http://cesr.org/downloads/Egypt.Factsheet.web.pdf> accessed 20 September 2016.

[6] Depending on which version of the doctrine one consults, there is a 'strong presumption' against retrogression, or retrogression is impermissible 'in principle', or straightforwardly 'not permitted'; for an example of each, see respectively CESCR, *General Comment 13* (n 1) para 45; CESCR, *General Comment 17* (n 1) para 27; CESCR, *General Comment 21* (n 1) para 65. See further Chapter 8, pp214-219.

foregrounded, the chapter is then well placed to move to its second task of identifying any parts of retrogression that have remained stable. These consistent features might then be taken forwards to form the core of retrogression.

The key features (in brief) of the conceptual models that the chapter develops are outlined here.

- The *Component* model posits that non-retrogression was not a self-supporting doctrine, but rather defined the conditions for a breach of the progressive realisation obligation. On this view, 'retrogression' was not a *substantive* development, but merely the indicated term to be used where States failed to progressively realise the rights in an 'expeditious and effective' manner.

- The *Corollary* model identifies the doctrine of non-retrogression as a rough opposite of the obligation to progressively realise. Although in this form, the doctrine was free to develop its own semi-distinctive identity, it remained constituted and constrained by the scope of the progressive realisation obligation.

- As a *Composite*, the doctrine of non-retrogression diverges from a strict grounding in one obligation (as is the case with the Component and Corollary models). Instead the doctrine is composed of multiple ICESCR obligations and principles, and as a more independent entity.

- The *Un-Coupled* conceptual model of non-retrogression highlights the separation of the doctrine from a grounding (only) in the ICESCR obligations. It theorises non-retrogression as a 'new' obligation upon States, where the content of the doctrine cannot be satisfactorily linked to the ICESCR articles.

Although necessarily presented in a somewhat linear fashion, there is not a straightforward timeline of evolution from a Component to an Un-Coupled model. Occasionally, a developing trajectory away from a particular model was disrupted to go back to an earlier form. An example of this is the move from a Corollary to Composite model between General Comment 18[7] and the *Statement on the Use of the Maximum of Available Resources under an Optional Protocol to the ICESCR ('MAR under OP')*.[8] This looked to be a new turn towards the Composite model and that conceptualisation was also used with some enthusiasm in the following General Comment 19.[9] This apparent trend, however, was reversed when the CESCR returned to employ a Corollary model in General Comment 21.[10] This sometimes disordered and swirling trajectory of development means a prediction of the doctrine's future development is difficult. In particular, it is difficult to say whether the somewhat more radical approach of the Un-Coupled model will continue as the global economic and

[7] CESCR, *General Comment 18* (n 1) para 21.

[8] CESCR, 'MAR under OP' (n 2) paras 9-10.

[9] CESCR, *General Comment 19* (n 1) para 42.

[10] CESCR, *General Comment 21* (n 1) para 65.

political context changes. In a sense this adds a degree of uncertainty to the analysis, but it also demonstrates the acute need for such an assessment. That the historical progression of the doctrine shows that the CESCR could adopt any (variation) of these models in its next General Comment or statement serves to highlight the openness of the approach and the need for an injection of direction and conceptual clarity.[11]

There are a number of phases in the chapter's deconstruction and its search for a core. After setting out the premises on which the modelling rests, the chapter enters into the task of unravelling the doctrine, first in its semantic aspects before comprehensively examining its models and its legal bases. Following this, the chapter will identify any 'core' features of the various doctrines discussed and more general findings are set out.

3.2. The Formation of the Doctrine

Before proceeding to flesh out the four conceptual models, some underpinning assumptions about the doctrine's formation need to be explicated. There are broadly three issues here; the first about the sources of the doctrine, the second about how the stages of its development are linked, and the third regarding the semantic stylings of retrogression. Often these premises remain below the surface, but they deserve attention as they are foundational to our understanding of the doctrine, and their examination shows that some assumptions on retrogression's form better 'fit' the pattern of the doctrine's development.

3.2.1. Sources

As has previously been highlighted, the doctrine has been included in eleven General Comments,[12] several other statements from the CESCR,[13] and been used by various Special Procedures.[14] Yet, when addressing the obligations of the non-retrogression doctrine, these sources can be treated in several ways. Does each mention of the doctrine constitute a context-specific enunciation, or a contribution to a general understanding of non-retrogression?

The former option – treating statements of the doctrine's scope as unique to a context – would create a somewhat complex picture. While some body of generalised non-

[11] This call for conceptual clarity is seen prominently in Nolan, Lusiani and Courtis (n 4) 121.

[12] See those General Comments listed in n 1 above.

[13] See those statements listed in n 2 above.

[14] See those reports of Special Mandate holders listed in n 3 above.

retrogression obligations would remain (e.g. from General Comment 3),[15] most other comments on the doctrine would be taken to apply only to specific rights. This would result, *inter alia*, in the non-retrogression criteria for the right to social security differing markedly from the criteria for ascertaining a retrogressive measure in respect of the right to education. Besides the practical difficulties in applying such varying standards to different rights, there would be several issues of principle if such an approach was the CESCR's intended one. First, varying standards of review for retrogressive measures would, without any clear justification for such differential treatment, do damage to the (theoretical) notion of interdependence and indivisibility of rights.[16] Second, for those ICESCR rights awaiting the individual attention of a General Comment (or for those rights considered prior to the CESCR's enthusiasm for the doctrine), only the generalised advice on non-retrogression would be available to define the scope of obligations.

The alternative assumption – that there is not a version of non-retrogression for each right, but rather a general picture of the doctrine and its meaning – is altogether more plausible. Yet, even on this view there can be diverging approaches. Are we to take all of the CESCR's work as contributing to this general picture of the doctrine, or are certain sources to be excluded as a result of their different form? In practice, this asks the question whether *only* the CESCR's General Comments contribute to the binding understanding of the doctrine or, if its discussion in Statements and Letters[17] form a part of the CESCR's views and the doctrine's content. Both views are arguable. In favour of General Comment exceptionalism, it can be argued that their authority is enhanced by the fact that these outputs are more established (in the sense that all treaty bodies rely on this mechanism[18]) and that they have a general character (in the sense that the Comments address obligations in the abstract rather than in relation to a specific context).[19] Yet despite these features of General Comments, in arguing in favour of an inclusive interpretation of the CESCR's sources, a return to the principles of public international law is rewarding.

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[15] Such a bundle of obligations would deal with 'the nature of States parties obligations' in general, rather than in connection to a specific right. CESCR, *General Comment 3* (n 1) para 9.

[16] For a critique of the substantive commitment to this see Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2011) 1–31.

[17] The analysis in this chapter largely sets the work in Concluding Observations aside to focus on the other sources. The extreme inconsistency and paucity of detail in Concluding Observations, combined with the 'applied' context of the statements makes depth of analysis impossible. These sources are more central to the discussion of practical applications of the doctrine in Chapters 5 and 8.

[18] Or on its equivalent 'General Recommendation' (the terminology used by the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women for the same type of statement).

[19] Similar to the General Comments of treaty bodies the practice of producing Statements is widespread. However, Statements tend to focus on current or thematic issues rather than act as a longer-term guidance on the content of rights. The CESCR's handling of individual communications would typify the treatment of the obligations in a specific context.

There remains an ambiguity around the legal status of General Comments and around the relevant alternative sources (the CESCR's *MAR under OP,*[20] its 2012 'Letter to States',[21] and its Statement on Public Debt and Austerity[22]). There are a number of different approaches to the international legal status of the documents. It has been noted that these comments and statements are not authoritative within international law in and of themselves, but rather have a general utility in the interpretation of the obligations under the relevant treaty.[23] The particular relevance of the views of the treaty bodies to the task of interpretation is said to be a consequence of those bodies' 'special experience' with the subject matter of the treaties.[24] Elsewhere it has been claimed that States' acquiescence with the views of the CESCR can constitute an 'interpretation' of the ICESCR within the meaning of the Vienna Convention on the Law of Treaties.[25] On that basis differentiating between the CESCR's interpretations in its General Comments and in its statements, is less defensible.

The relative status of the Committee's Statements and Letters remains open to challenge, however. The rarity of such open letters, and a lack of attention to their status leaves significant ambiguity.[26] Again, a return to general principles of public international law sheds some (limited) light on the status.[27] There are two, more or less distinct issues to be addressed; first the potential 'hard law' roots for the CESCR's documents (and therefore for retrogression), and second, the softer legal bases for its existence.

An obvious, but necessary, preliminary point is that the doctrine's absence from the ICESCR itself removes the prospect of a direct legal basis. Indeed, discussions of the doctrine (or

[20] CESCR, 'MAR under OP' (n 2).

[21] Chairperson of the CESCR (n 2).

[22] CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (n 2).

[23] Christine Chinkin, 'Sources' in Daniel Moeckli and others (eds), *International Human Rights Law* (Oxford University Press 2013) 81; Office of the High Commisoner for Human Rights, *The Human Rights Treaty Bodies* (2015) 4 <http://www.ohchr.org/Documents/HRBodies/TB/TB_booklet_en.pdf> accessed 20 September 2016.

[24] *Bosnia and Herzegovina v Serbia and Montenegro (Application of the Convention on the Prevention and Punishment of the Crime of Genocide)* [1996] (ICJ) 640, 654 (*Separate Opinion of Judge Weeramantry)*.

[25] Yogesh Tyagi, 'The Denunciation of Human Rights Treaties' in James Crawford and Vaughan Lowe (eds), *British Year Book of International Law 2008* (Oxford University Press 2009) 139; *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980, 332 UNTS 1980) article 31(3)(b). It should be noted generally that the applicability of articles 19 and 20 of the VCLT in the human rights context has been challenged. See Human Rights Committee, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41* (UN Doc CCPR/C/21/Rev1/Add6 1994) para 17; Catherine J Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)' (1997) 46(2) International & Comparative Law Quarterly 390, 404–6.

[26] Nolan (n 4) 50 and fn54.

[27] As alluded to by Simma and Alston, there is likely to be a connection between the solidity of enforcement mechanisms and the grounding of international human rights in international law; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Year Book of International Law 82, 83–85.

similar ideas) also seem to be absent from the *travaux préparatoires*.[28] This clearly eliminates any well-founded claim that the CESCR's work is merely a restatement of treaty obligations. Moving beyond treaties to the other recognised sources of international law (international custom and the general principles of law[29]) is therefore necessary. It is sometimes suggested that the sources of international human rights law demand qualitatively different treatment within the structures of general international law.[30] This is eschewed here for two reasons. First, the discussion remains unsettled, so it can contribute only further confusion to an already complex identification of retrogression's sources. Second, and more importantly, while it might strategically serve some areas of international human rights well to argue for an exceptional designation within international law, non-retrogression is not one of those areas. The overall approach of the chapter is to seek solidity and legal grounding for retrogression; neither of which can be found in a developing rule of exception.

When turning to find a foundation in the sources of international law, discounting customary international law as the basis for the CESCR's enunciation(s) of the doctrine of non-retrogression is unproblematic. As is well known, the formation of such a custom requires both State practice and *opinio juris*,[31] elements that remain decidedly non-existent for non-retrogression in any form.[32] A further port-of-call in seeking a 'hard' legal basis for the CESCR's vision of non-retrogression is the nebulously termed 'general principles of law'.[33] Here lies a general potential for the integration of international human rights law, according to Simma and Alston, who identify the International Court of Justice's trend towards such an approach.[34] Yet, despite the Court's flexibility regarding a 'formal source' for the fundamental human rights principles that it integrates, this flexibility is unlikely to stretch far beyond the perceived (and limited) 'fundamentals' of rights protection.[35] In all reality, this excludes any rendering of non-retrogression from acceptance as a 'general principle' and consequently as grounded in formal hard law.

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[28] Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014); Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press; OUP 1995).

[29] *Statute of the International Court of Justice* (1945) arts 38b and 38c.

[30] Some of the development of human rights exceptionalism can be seen in Redgwell (n 25).

[31] See generally Malcolm Shaw, *International Law* (CUP 2014) 51ff.

[32] Indeed Simma and Alston question the practical role that can be played by international human rights in the creation of customary law partly due to the lack of 'interaction' between States as regards the international human rights system; Simma and Alston (n 27) 99.

[33] *Statute of the International Court of Justice* (n 29) art 38c.

[34] Simma and Alston (n 27) 105–6.

[35] ibid 105.

This demands recourse to the softer forms of international law.[36] Perhaps due to its capacity to broker compromise in a sensitive area of State policy,[37] softer law plays a significant role in the international human rights regime.[38] As bodies of independent experts, the committees lack the authority[39] to create and interpret obligations that a State would have.[40] Yet, as pointed out by Mechlem, with human rights treaties, leaving the interpretation solely in the hands of States would lead to overly restrictive interpretations.[41] As a consequence, treaty bodies act 'in lieu' of States and are primarily responsibility for the interpretation of the human rights treaty.[42] This function of the committees grounds the argument – made by the International Law Association[43] – that treaty body practice might count as 'subsequent practice' under the VCLT rules on treaty interpretation.[44]

A number of consequences would flow from attributing such a weight to treaty body practice. It would, importantly, give a significant interpretative weight to the work of the committees. Further, as the authority is derived from the *institutional position* of the treaty body, the *form* of its output (be it a Letter, Statement or General Comment) would be less relevant in determining legal weightiness.[45] On the other hand, situating the treaty bodies as interpreters, rather than adjudicators,[46] of the human rights treaties underlines the importance of a close link between their work and the parent treaty. The primary rule of treaty interpretation remains that the 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms'.[47] Straying from the ordinary meaning of the text, risks diminishing the weight that is attached to the committees' interpretations.

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[36] The term 'softer' rather than soft is deliberately used to denote the increasing acknowledgement of a spectrum (rather than a dichotomy) of authority; Hilary Charlesworth, 'Law-Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 189. Cf D'Amato's view of soft law as a hindrance to the hard and distinctive categories of international law's sources, and as 'a vehicle used by impatient idealists'; ibid 199.

[37] CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International & Comparative Law Quarterly 850, 861.

[38] Paula Gerber, Joanna Kyriakakis and Katie O'Byrne, 'General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect' (2013) 14 Melb. J. Int'l L. 93, 99–104.

[39] Which is reserved almost exclusively for States; Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 16–18.

[40] Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (3rd edn, OUP 2010) 299.

[41] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' 42 Vanderbilt Journal of Transnational Law 905, 919.

[42] ibid. A function also with some grounding in the ICESCR itself; *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) art 21.

[43]International Law Association, 'International Human Rights and Practice: Final Report on the Impact of the Findings of the United Nations Human Rights Treaty Bodies' (2004) para 22.

[44] *Vienna Convention on the Law of Treaties* (n 25) art 31(3)b.

[45] See further the citation of non-General Comment work by national courts; International Law Association (n 43) 103–115.

[46] CAT, *General Comment 1: Communications Concerning the Return of a Person to a State Where There May Be Grounds He Would Be Subjected to Torture (Article 3 in the Context of Article 22)* (UN Doc A/53/44, annex IX 1998) para 9.

[47] *Vienna Convention on the Law of Treaties* (n 25) art 31(1).

The above argumentation has utility in turning the search for legal weight away from the form and status of documents, and towards the authority of the committees to interpret the treaties. Nonetheless, as the form-based approach remains dominant in the literature, it is worth briefly addressing the question of whether Statements and Letters of the CESCR might have legal force.[48]

The CESCR has only ever produced two open letters,[49] although its use of statements is significantly more widespread.[50] No other treaty monitoring committee has a practice of producing open letters such as these and it has been suggested that that the Letter may not even have the status of soft law.[51] Yet the Letter may still have, or acquire, some form of soft law status as a result of Committee's use of its tests in subsequent documents.[52] For example, of the 68 States that have been examined since the release of the Letter, 19 have been reminded of it or have had its wording reproduced in their Concluding Observations.[53] This means that the Letter has already been used more times than retrogression has *ever* been mentioned in all of its other forms.[54]

Such an acquisition of a legal basis for the Letter could follow from the CESCR's primary responsibility for the interpretation of the Covenant and would allow its interpretations to count as 'subsequent practice' under the VCLT rules on treaty interpretation, thus giving the letters and statements of the Committee some legal significance.[55] In any case, even if outputs of the CESCR such as Statements and Letters lack soft law status, adjudicative

[48] The following two paragraphs are adapted from; Ben TC Warwick, 'Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression' (2016) 65(1) International and Comparative Law Quarterly 249, 255–256.

[49] The other letter being similarly formatted and presented, and being in respect of the post-2015 development agenda. Chairperson of the CESCR, 'Letter Dated 30th November 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc CESCR/49th/AP//MAB.

[50] Statements are formatted differently, and generally come from the CESCR as a whole, having been 'adopted' in one of the CESCR's sessions, rather than from the Chairperson 'on behalf of' the Committee.

[51] Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds.) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013), 50.

[52] ibid, 51.

[53] In the CESCR's *Concluding Observations: Angola* (UN Doc E/C12/AGO/CO/4-5 2016) para 8; *Concluding Observations: Sweden* (UN Doc E/C12/SWE/CO/6 2016) para 30; *Concluding Observations: United Kingdom* (UN Doc E/C12/GBR/CO/6 2016) para 19; *Concluding Observations: Canada* (UN Doc E/C12/CAN/CO/6 2016) para 10; *Concluding Observations: Greece* (UN Doc E/C12/GRC/CO/2 2015) para 8; *Concluding Observations: Italy* (UN Doc E/C12/ITA/CO/5 2015) para 9; *Concluding Observations: Sudan* (UN Doc E/C12/SDN/CO/2 2015) para 18; *Concluding Observations: Iraq* (UN Doc E/C12/IRQ/CO/4 2015) para 16; *Concluding Observations: Ireland* (UN Doc E/C12/IRL/CO/3 2015) para 11; *Concluding Observations: Portugal* (UN Doc E/C12/PRT/CO/4 2014) para 6; *Concluding Observations: Slovenia* (UN Doc E/C12/SVN/CO/2 2014) para 8; *Concluding Observations: Romania* (UN Doc E/C12/ROU/CO/3-5 2014) para 15; *Concluding Observations: Czech Republic* (UN Doc E/C12/CZE/CO/2 2014) para 14; *Concluding Observations: Ukraine* (UN Doc E/C12/UKR/CO/6 2014) para 5; *Concluding Observations: Japan* (UN Doc E/C12/JPN/CO/3 2013) para 9; *Concluding Observations: New Zealand* (UN Doc E/C12/NZL/CO/3 2012) para 17; *Concluding Observations: Iceland* (UN Doc E/C12/ISL/CO/4 2012) para 6; *Concluding Observations: Bulgaria* (UN Doc E/C12/BGR/CO/4-5 2012) para 11; *Concluding Observations: Spain* (UN Doc E/C12/ESP/CO/5 2012) para 8.

[54] Which, by comparison, is around 15 mentions over a period of 25 years.

[55] International Law Association (n 43) para 22; *Vienna Convention on the Law of Treaties* (n 25) art 31(3)b.

bodies would likely take them seriously as an interpretation of the ICESCR obligations.[56] An absence of *legal* obligation does not necessarily imply that States will feel free to, or indeed will, act outside of the recommendation.[57] And, as traditional public international lawyers often note, soft law can 'harden' and form the basis of customary international law or a new treaty (amendment).[58]

Further, such statements have significance beyond their legal influence. By providing (at the very least) a point of reference or a form of words that can be reproduced in the CESCR's Concluding Observations on State reports, such outputs of the CESCR hold a degree of rhetorical power.

These factors point towards assuming as the most likely intention of the CESCR an inclusive, generalized view of the sources that address the doctrine of non-retrogression. As such, criteria that are developed in the context of a General Comment on, for example health, will be treated as criteria applying to all ICESCR rights. Additionally, no strong distinction will be assumed between General Comments, Statements and Letters as sources of the doctrine's content.

3.2.2. Continuity

In addition to the above premises regarding the sources of the doctrine, when employing these sources certain assumptions must be made about their treatment. Thus, the question arises; should the first enunciation of non-retrogression in 1991 be treated as equally valid as the more recent interpretations?[59] The answer to such a question is dependent upon the degree to which the doctrine is seen as a changing entity.[60] The multiple re-statements of non-retrogression can be viewed as: a consistent whole, that hasn't changed or has changed minimally; a consistent whole that has developed over time; or as several (divergent) doctrines. Some of these different treatments of the various versions of the doctrine are more plausible than others, but the view taken affects the overall approach to the doctrine significantly.

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[56] Crystallization into customary international law is also possible. See generally Shaw (n 31) 201.

[57] Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71(2) American Journal of International Law 296, 300–301.

[58] DJ Harris, *Cases and Materials on International Law* (Sweet & Maxwell 2010) 57. The use in the Concluding Observations is likely to hasten this hardening.

[59] For a statement of the general approach of international law to 'inter-temporal validity', see Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (CUP 1970) 132.

[60] In which case treatment in the classical 'living instrument' manner would be appropriate. See for an example; *Tyrer v United Kingdom* [1978] European Court of Human Rights Application 5856/72 [31]; CommRC, *General Comment 8: The Right of the Child to Protection from Corporal Punishment and from Cruel or Degrading Punishment* (UN Doc CRC/C/G8/8 2006) para 20.

Treating the doctrine as unchanging cannot adequately account for the various criteria that have been added over time.[61] It is possible, if not entirely convincing, to treat the different criteria of the doctrine as a general and a specific version of non-retrogression. For example, the CESCR's statement (*MAR under OP*) could be treated as creating a doctrine of non-retrogression only applicable to Optional Protocol complaints. Alternatively, it is possible to treat the retrogression in the Letter to States as a statement on how the doctrine should be assessed in a crisis and therefore to view it as separate to the generalised doctrine. Yet, although the CESCR would clearly have been aware that the release of a letter represented a break with previous practice, there is little to evidence an intention that goes beyond this. The contention that the CESCR intended to complicate non-retrogression into multiple regimes, does not have strong foundations. Elsewhere, there has been no trend of creating context-specific obligations for general ICESCR obligations. On the contrary, in its General Comment on the right to work, the CESCR notes that '[a]s for all other rights in the Covenant' there is a presumption against retrogression.[62] There are also a large number of general principles (eg. respect, protect fulfil; AAAQ; minimum core) that apply with striking consistency. Additionally, similar objections apply here as with the prospect of right-specific retrogression discussed above; damage to interdependence and indivisibility, and the lack of consideration of other scenarios that could be considered 'special'. This leads to the conclusion that it is not a process of specialisation that has led the doctrine towards multiple versions.

If not unchanging or splintered into specialised and generalised regimes, how else might the doctrine's development be thought of? Two options remain; treating non-retrogression as a single but incrementally developing entity, or treating it as multiple and well-differentiated doctrines. As will be fully shown below (in section 3.3.), the clear and marked phases of the doctrine cannot be accounted for by natural, incremental developments over time. The traditional 'living instrument' approach of the CommRC and the ECtHR[63] cannot account for the nature and pace of change to retrogression. The concept cannot adequately be thought of as having a singular form, but must instead be seen as having a multiple and fragmented form.

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[61] See a timeline of the CESCR's various interventions at Appendix A, and the various criteria it has used at Appendix B.

[62] CESCR, *General Comment 18* (n 1) 34; identical language is also used in CESCR, 'General Comment 21: Right of Everyone to Take Part in Cultural Life' para 46.

[63] Conway Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comment' (2008) 17 Center for Human Rights and Global Justice Working Paper Number 22 <http://chrgj.org/wp-content/uploads/2012/07/blake.pdf> accessed 20 September 2016.

3.2.3. Semantic Evolutions

It is also important to clarify the terminology used to describe the doctrine. Semantics have had a bearing on the formation of the doctrine. At its most basic it is described as; 'The' 'Doctrine' of 'Non'-'Retrogression'. Each of those four words (to which one might also add 'regression', 'backwards steps' and 'measures') steer retrogression in particular directions. This is a generally worn observation on the nature, function and interpretation of language.[64] Combined with the retort to such a semantic examination that some descriptor word is always necessary, a substantive critique of the semantics surrounding retrogression seems less pressing. However, there does remain a value in explaining the potential implications and emphases of the linguistic choices. This matches the deconstructing and reflexive theme of the chapter.

Several more isolated instances of linguistic deviation by the CESCR can be briefly dealt with.[65] The first appearance of the concept employed the term 'retrogressive' and in the work of the CESCR this has remained the term used in the vast majority of instances. There have been only infrequent uses of the correlated term 'retrogression',[66] but there have been multiple uses (including in General Comment 21[67]) of the distinct term 'regressive'.[68] It might be argued that employing a single term for describing the concept would be an advantage in terms of strengthening and clarifying meaning. Indeed, the out-of-place use of the term 'regressive' over the more established 'retrogressive' in the CESCR's Letter to States on the crises[69] was highlighted as contributing to uncertainty around the future of the doctrine.[70] The choice of which term to assemble around, is a relatively simple one. The term 'regressive' has a well-established meaning beyond the ICESCR (especially in relation to tax[71]).[72] The less-developed 'retrogressive' term can therefore be preferred to 'regressive' as it contributes a particularity around which an insulated legal meaning can be formed.

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[64] Ronald Dworkin, 'Law as Interpretation' [1982] Critical Inquiry 179, 182ff.

[65] Special mandate holders are sometimes more flexible in their use of the terms, see for an example of a mandate holder seeming to note an absolute prohibition on retrogression; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (n 3) para 14.

[66] CESCR, *Concluding Observations: Egypt* (UN Doc E/C12/EGY/CO/2-4 2013) paras 6, 18.

[67] CESCR, 'General Comment 21' (n 62) para 65.

[68] CESCR, 'Report on the Sixth Session' (1992) UN Doc E/1992/23 para 219 (Concluding Observations on Finland); CESCR, *Concluding Observations: Mali* (UN Doc E/C12/1994/17 1994) para 52; CESCR, *Concluding Observations: United Kingdom* (UN Doc E/C12/GBR/CO/5 2009) para 33; CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions' (2011) UN Doc E/2011/22 para 463 (Decision on cooperation with specialized agencies); CESCR, *Concluding Observations: Spain* (n 53) para 28.

[69] Chairperson of the CESCR (n 2).

[70] Nolan (n 4) 50–1.

[71] This is an especial issue where the CESCR or State would wish to address the quite separate matter of regressive tax or financing regimes; CESCR, *Concluding Observations: Columbia* (UN Doc E/C12/1/Add74 2011) para 14; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Ireland* (UN Doc E/1990/6/Add29 2000) para 231.

[72] 'Regressive' is defined as '[o]f, relating to, or designating backward movement in space; characterized by such movement; retrograde'; Oxford English Dictionary, *Regressive* (2014).

Such linguistic particularity is necessary in light of the (ab)use of both 'regressive' and 'retrogressive' in contexts that are not linked to their legal meaning. Thus State reports to the CESCR[73] and the CRC[74] have employed the term in general descriptions as an approximation for 'backwards' or 'undesirable', while one State has employed the mathematical meaning of 'regression' (a statistical technique) in its report[75] and another has discussed 'retrogression' on matters of civil and political rights.[76] There are many times fewer (mis)uses of the 'retrogression' term in State reports to the CESCR.[77] A report of the Open-ended Working Group on an optional protocol to the ICESCR, notes that States couched some of their concerns about harmful amendments in terms of 'retrogression'.[78] As far as these distinctions are concerned, then, to maintain a distinctive and bounded meaning, 'retrogressive' and its companion terms 'retrogression', 'retrogressively', and 'retrogressed' are clearly preferable.

If 'retrogressive' is the adjective or adverb of the concept, what is the noun or verb it describes?[79] Here, the terms 'measure'[80] and 'step'[81] are used without distinction by the Committee. On the whole, this substitution seems unproblematic. The term 'measure' may

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[73] *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Croatia* (UN Doc E/1990/5/Add46 2000) para 403; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Jamaica* (UN Doc E/C12/JAM/3-4 2011) para 180; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Kenya* (UN Doc E/C12/KEN/1 2007) para 134; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: El Salvador* (UN Doc E/1990/5/Add25 1995) para 176; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Argentina* (UN Doc E/C12/ARG/3 2011) paras 205, 499, 683; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Belgium* (UN Doc E/C12/BEL/3 2006) para 124; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Austria* (UN Doc E/1994/104/Add28 2004) para 160; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Columbia* (UN Doc E/C12/4/Add6 2000) paras 60, 316; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Czech Republic* (UN Doc E/1990/5/Add47 2001) paras 8, 183; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Poland* (UN Doc E/C12/4/Add9 2001) para 363; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Republic of Moldova* (UN Doc E/C12/MDA/2 2009) paras 578, 580; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Korea* (UN Doc E/C12/KOR/3 2008) para 347; *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Cameroon* (UN Doc E/C12/CMR/2-3 2010) paras 505, 535.

[74] *State Party Report under the Convention on the Rights of the Child: Bosnia and Herzegovina (OPSC)* (UN Doc CRC/C/OPSC/BIH/1 2010) para 231; *State Party Report under the Convention on the Rights of the Child: Burundi* (UN Doc CRC/C/3/Add58 1998) para 225; *State Party Report under the Convention on the Rights of the Child: Republic of Maldives* (UN Doc CRC/C/MDV/4-5 2012) para 67; *State Party Report under the Convention on the Rights of the Child: Bolivia* (UN Doc CRC/C/BOL/4 2009) para 290; *State Party Report under the Convention on the Rights of the Child: Sao Tome and Principe* (UN Doc CRC/C/8/Add49 2003) para 429; *State Party Report under the Convention on the Rights of the Child: Myanmar* (UN Doc CRC/C/8/Add9 1995) para 11; *State Party Report under the Convention on the Rights of the Child: Kenya* (UN Doc CRC/C/KEN/2 2006) para 446; *State Party Report under the Convention on the Rights of the Child: Peru* (UN Doc CRC/C/125/Add6 2005) para 209.

[75] *State Party Report under the Convention on the Rights of the Child: Armenia* (UN Doc CRC/C/93/Add6 2003) para 325.

[76] *State Party Report under the Convention on the Rights of the Child: China (Hong Kong Special Administrative Region)* (UN Doc CRC/C/83/Add9 (Part I) 2004) para 85.

[77] The only notable example being, *State Party Report under the International Covenant on Economic, Social and Cultural Rights: Korea* (UN Doc E/1990/6/Add23 1999) para 65.

[78] Catarina de Albuquerque, *Report of the Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Fifth Session* (UN Doc A/HRC/8/7 2008) paras 161, 243.

[79] This distinction between retrogression as a noun or verb is an important one that is returned to in Chapter 8, especially pp222-223.

[80] Used widely in all General Comments that mention regression or retrogression. For a list of those General Comments see Appendix A.

[81] Used in Concluding Observations as well as in CESCR, *General Comment 18* (n 1) para 21; CESCR, 'MAR under OP' (n 2) paras 9-10.

capture a narrower range of State activity in some respects than 'step'. The latter term might be taken to denote any movement whatsoever, while the word 'measure' connotes a stately solidity.

For completeness' sake, a glance at the negation of 'retrogressive measures' is necessary. Retrogressive measures are, in the most basic terms, a negative prospect. However, a 'doctrine of retrogression' does not readily indicate the doctrine's censure of the measures. Several terms have thus been prefixed to 'retrogressive measures' in order to highlight that the doctrine seeks to discourage retrogression. As such, it is often described as the doctrine of 'non-retrogression'[82] or as a 'prohibition' on retrogression.[83] The 'non' and 'prohibition' here are presumably to reinforce the objective of *avoiding* (all) retrogression. With greater nuance, and capturing the dynamic of the doctrine as permitting some kinds of retrogression, is the term 'impermissible' retrogressive measure.[84] In a similar way to 'non', this term clearly communicates the basic idea that retrogression runs contrary to the Covenant. The difficulty in communicating this idea with the 'retrogression' term itself is both troubling and unsurprising. It is unsurprising because of the opacity of the term (why not describe a prohibition on 'rights reduction', or as a doctrine of 'rights curtailment'?). On the other hand, it is troubling that the opacity of the 'retrogressive' term has been so hard to overcome. Such difficulty was undoubtedly a factor in the turn towards the description of retrogression as a prohibition on 'backwards steps'.[85] Yet there should be extreme caution around allowing names to shape the substance of the doctrine. Retrogression should not come to govern only 'backwards steps' because this role is easier to describe.

If the subject of the regulations developed in the CESCR's work are 'impermissible retrogressive steps', how then can the regulations themselves be described? The scholarship has tended to describe the bundle of regulation as a 'doctrine'. However, this is terminology alien to the Committee itself, not appearing anywhere in its work in connection to retrogression (or its terminological variants). Neither, however, does the CESCR describe retrogression in other terms (examples might be as a 'mechanism', 'principle', or 'obligation'). Without guidance from the Committee as to its preferred designation, the

[82] For a selection of examples see Radhika Balakrishnan, Diane Elson and Raj Patel, 'Rethinking Macro Economic Strategies from a Human Rights Perspective' (2010) 53 Development 27, 31; Nolan, Lusiani and Courtis (n 4); Salomon (n 4) 544; Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights (n 3) para 71; Special Rapporteur on the Right to Food (n 3) para 41.

[83] This phrasing is widespread. For one example see Special Rapporteur on extreme poverty and human rights (n 3) para 28.

[84] This phrasing is widespread. For one example see, CESCR, *General Comment 13* (n 1) para 45.

[85] See for example, Special Rapporteur on extreme poverty and human rights (n 3) para 28; Special Rapporteur on the human right to safe drinking water and sanitation (n 3) para 46. The analogous term, 'backsliding' is also used; Center for Economic and Social Rights (CESR), 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (n 5) 6; Nolan, Lusiani and Courtis (n 4) 125.

path of least resistance would be to continue using the term 'doctrine' as proposed in the scholarship. Yet there are a number of difficulties with this term. The term contains a certain solidity,[86] that is almost certainly useful in advocacy contexts, but which could overreach the basis of retrogression itself. The term might be seen to specify retrogression as a stable and free-standing legal concept, a characterisation that is argued below (in Section 3.3.) to be somewhat dubious. An alternative term, such as 'mechanism' perhaps returns retrogression to a status subordinate to other obligations. A mechanism of retrogression, instead of serving its own (separatist) aims, could be regarded as working flexibly for the improvement of another legally well-grounded ICESCR obligation. Yet there are difficulties with this term too. The CESCR has previously used 'mechanism' to denote actions within States parties,[87] and adding an international monitoring dimension might create conflicts of meaning. More significantly, a shift to terming retrogression as a 'mechanism' cedes a degree of authority that is inherent in the 'doctrine' term. Ultimately, the choice of term is contingent upon the purpose and construction of retrogression that one adopts. Viewed as subservient to progressive realisation, it can be thought of as a mere mechanism in achieving this purpose, while, if viewed as a standalone entity the term 'doctrine' would be more appropriate.

Finally, the role of terminology in constructing the image of a single doctrine has been pivotal. The description of 'the' doctrine of non-retrogression has served to suggest a unity to the disparate elements and diverse enunciations of retrogression. As discussed in depth below, there are in fact some nine different combinations of criteria that can be classed into not one, but four conceptually distinct versions of the doctrine of non-retrogression.

These four conceptual models have somewhat distinct legal groundings, and will be referred to as the Component model, the Corollary model, the Composite model and the Un-Coupled model.

3.3. Four Doctrines of 'Non-Retrogression': Conceptual Models and their Application

In suggesting the existence of four conceptual models of non-retrogression, this section runs counter to the predominating view of non-retrogression. Non-retrogression is most

[86] Perhaps reflected in the most relevant dictionary definition; 'Doctrine: A body or system of principles or tenets; a doctrinal or theoretical system; a theory; a science, or department of knowledge'. Oxford English Dictionary, *Doctrine* (2014).

[87] For an example see, CESCR, *General Comment 12: The Right to Adequate Food (Art 11 of the Covenant)* (UN Doc E/C12/1999/5 1999) paras 24, 29–31.

commonly thought of as a single doctrine.[88] These analyses have undoubtedly aided the development of norms and, in particular, the practice surrounding both the doctrine and more broadly, the realisation of ESR. This development of the doctrine has allowed parts of international civil society to construct a human-rights based response to the financial and economic crises that would certainly have been more difficult without it.[89] Yet the 'single doctrine' view has failed to identify a firm conceptual footing in the ICESCR. The addition of further criteria over time has not resulted in the clarity so desired (and needed). As such, the single doctrine has failed in the pragmatic aspect (lacking clarity and effectiveness) and in theoretical aspect (lacking a conceptual grounding) and the vision of a single doctrine begins to look unconvincing. As a key point of departure, the analysis below distinguishes and groups the nine separate combinations of criteria that the CESCR has produced to determine the existence of a retrogressive measure.[90] This is used in the final substantive section to suggest that, in order to design a conceptually convincing doctrine, we must be clear and open what purpose lies at its core, and what its legal basis is.

[88] Some give a fuller account of the doctrine's variations (Nolan, Lusiani and Courtis (n 4) 134; Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) The International Journal of Children's Rights 248, 257; Illari Aragon Noriega, 'Judicial Review of the Right of Health and Its Progressive Realisation: The Case of the Constitutional Court of Peru' (2012) 1 UCLJLJ 166, 172; Radhika Balakrishnan and Diane Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights' (2008) 5(1) Essex Human Rights Review 6.), while others rest with the enunciation in General Comment 3 (Craig M Scott, 'Covenant Constitutionalism and the Canada Assistance Plan' (1994) 6 Constitutional Forum 79, 81; Dianne Otto and David Wiseman, 'In Search of "Effective Remedies": Applying the International Covenant on Economic, Social and Cultural Rights in Australia' (2001) 7(1) Australian Journal of Human Rights 5, 44; Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23(4) Human Rights Quarterly 1062, 1070).

[89] For some examples see; Center for Economic and Social Rights (CESR), 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (n 5) 5, 6, 11; Center for Economic and Social Rights (CESR), 'Austerity and Retrogression: Have Governments Got the Right? (Open Letter to Prime Minister Mariano Rajoy)' (6 February 2012) <http://www.cesr.org/article.php?id=1229> accessed 20 September 2016; Luis Jimena Quesada, 'Conference on "Protecting Economic and Social Rights in Times of Crisis: What Role for the Judges?"' (European Commission For Democracy Through Law (Venice Commission) 2014) 4 <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-LA(2014)003-e> accessed 20 September 2016; ESCR-net, 'The Financial Crisis and Global Economic Recession: Towards a Human Rights Response' (no date) <https://docs.escr-net.org/usr_doc/EconomicCrisisHRStatement_ESCR-Net_final_eng_withendorsements.pdf> accessed 20 September 2016; Elmira Nazombe, 'The US Financial Crisis, Post-2015 Development Agenda, and Human Rights' <http://www.rightingfinance.org/?p=1011> accessed 20 September 2016; Joanna Manganara, 'The Effects of the Economic Crisis on Women in Europe' <http://womenalliance.org/the-effects-of-the-economic-crisis-on-women-in-europe> accessed 20 September 2016; Rory O'Connell and others, 'Budget Analysis and Housing in Northern Ireland' (Knowledge Exchange Seminar Series 2014-15 2015) <http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series4/kess_oconnell_harvey_nolan_rooney.pdf> accessed 20 September 2016.

[90] See Appendix B for details of the various criteria and the nine sets of obligations that have been distinguished.

Component	**Corollary**	**Composite (example 1)**	**Composite (example 2)** **These criteria apply where lack of resources invoked**	**Un-Coupled (core features; other criteria also present)**
Deliberate	Deliberate	Deliberate		Temporary
Justified by reference to totality of rights	Justified by reference to totality of rights	Justified by reference to totality of rights	Justified by reference to totality of rights	Necessary
Use of Maximum Available Resources	Use of Maximum Available Resources	Use of Maximum Available Resources	Use of Maximum Available Resources	Non-discrimination
	Strong Presumption	Strong Presumption		
	Burden upon State Consideration of alternatives	Burden upon State	Burden upon State Consideration of alternatives	
		Reasonable justification	Existence of a recession	
		Participation Discrimination Sustained impact	Existence of a disaster Level of development International cooperation	
		Unreasonable impact	Protection of the Minimum Core	
		Minimum essential level Independent review		
General Comment 3	**General Comments 13, 14, 15, 17 (although Maximum of Available resources was not mentioned in connection with retrogression), 18, 21**	**General Comment 19**	**Statement on the use of the Maximum of Available Resources under an Optional Protocol to the ICESCR**	**Letter to States, General Comment 22, General Comment 23, Statement on Public Debt, Austerity and the ICESCR**

Table 2

3.3.1. The 'Component' Model

The Component model is best typified by the configuration of non-retrogression in General Comment 3. There the doctrine sits within the obligation to progressively realise the rights. Such a modelling of the doctrine deprives it of any significant (independent) substance. In this sense, non-retrogression is barely a 'doctrine' at all, and is closer to a description of the conditions for a breach of the progressive realisation obligation. Its purpose might be thought of as providing supporting language to the progressive realisation duty. Indeed, the first mention of the term 'retrogressive' was nested in the General Comment next to guidance on interpreting state obligations under article 2(1) of the ICESCR.[91] This model hinges on the view that the CESCR did not intend to create a new doctrine of non-retrogression in General Comment 3, but instead intended to clarify the extent of the progressive realisation doctrine. This new interpretation of the General Comment is developed fully below.

A component obligation can be seen as one deeply connected to an existing and well established part of the legal framework. Such an obligation fits within the functioning of another concept or obligation, rather than having a separate legal identity. Indeed, if obligation B is a component of obligation A, it (B) might be thought of as somewhat necessary to the functioning of that obligation (A). A purportedly novel development that has no *substantive* innovation (although there may be innovation in some other respect) could be classed as a component of another obligation. With such little change to the substance of the obligation, it is probable that such an obligation or something similar was envisaged during the treaty drafting process.

As detailed in the previous chapter, it is likely that the history of non-retrogression is less bold than might be thought.[92] Although the starting point of the history of non-retrogression for ESR at the international level is a single sentence in the CESCR's General Comment 3, the history of the CESCR's early sessions provides little to suggest that this sentence was intended as the advent of a novel obligation. This makes it unlikely that the CESCR in General Comment 3 set out to detail a doctrine to govern the taking of 'backwards' steps that would supplement the progressive 'forwardness' of progressive realisation. More simply, the doctrine of retrogressive measures was not really intended as a conceptually innovative doctrine at all.

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[91] CESCR, *General Comment 3* (n 1) para 9.

[92] See Chapter 2, pp16-22.

'Retrogression' was not designed by the CESCR as a separate concept, but instead was intended as a component of the progressive realisation obligation. The term 'retrogressive measure' was intended only for use as a term to denote a violation of the obligation to progressively realise the rights contained in the ICESCR. In other words, according to General Comment 3 while progressive realisation required 'expeditious and effective' realisation, a retrogressive measure was a measure that did something less than progressively realise rights in a fully 'expeditious and effective' manner.

The reasons for ascribing this humbler meaning to General Comment 3 retrogression can broadly be described in terms of history and context, and a close re-reading of the text.

As a full account of the relevant history of the CESCR was given in the preceding chapter, only the salient points are returned to here. The dominant theme of the years that led up to the introduction of the term 'retrogression' by the CESCR, is of uncertainty. Despite ECOSOC having been mandated by the text of the ICESCR to monitor the implementation of the Covenant,[93] it had failed to do so effectively, as had the various Sessional Working Groups that it had set up.[94] As such, the newly formed CESCR was in a position of precariousness, tasked with demonstrating that the ICESCR was capable of effective supervision while contemporaneously reforming a confused system of partial State reports. In addition to this set of inherited issues, the new Committee faced threats of its own in terms of independence from ECOSOC,[95] resources,[96] time[97] and the politicisation[98] of its functioning. The CESCR's introduction of General Comments brought it in line with its sister body, the Human Rights Committee, but was a practice that came with its own risks. There was a heavy emphasis on the experience of the CESCR in examining States' previous reports, which, it was argued made the Committee well-placed to offer guidance in the form of General Comments.[99] Yet, the Committee did not claim any significant powers to develop the ICESCR obligations. Neither, in light of the substantial lack of clarity around some of the obligations (and progressive realisation, in particular) is it likely that the Committee were intent upon opening up new obligations and with them, new potential confusions.

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[93] *International Covenant on Economic, Social and Cultural Rights* (n 42) art 17.

[94] Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' (1987) 9(3) Human Rights Quarterly 332, 332.

[95] Philip Alston and Bruno Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' (1987) 81(3) The American Journal of International Law 747, 755–756.

[96] Alston and Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' (n 95). Alston and Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' (n 95).

[97] Alston and Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' (n 95) 754.

[98] Philip Alston and Bruno Simma, 'Second Session of the UN Committee on Economic, Social and Cultural Rights' (1988) 82(3) The American Journal of International Law 603, 604, 615.

[99] CESCR, 'Report on the Second Session' (1988) UN Doc E/1988/14 para 368.

In looking at the text of General Comment 3, there is even less to suggest that the Committee intended to develop a new category of obligation. There it notes;[100]

Progressive realisation

'It [progressive realisation] thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.

Retrogression

Moreover, any *deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*'

Component View: Progressive realisation

In that Comment, in 1990, the meaning of a retrogressive measure was contained in a single sentence. That sentence was positioned curiously at the conclusion of a paragraph on progressive realisation. Progressive realisation is described as '[t]he principle obligation of result', and is elaborated in a paragraph only marginally longer than any other in the General Comment. The Committee begin by recounting the long-term nature of some rights, before emphasising that Covenant obligations are not devoid of content and meaning. It reiterates this point by noting the flexibility provided by the progressive realisation formulation on the one hand, and the clear obligations that it sets down, on the other. The final sentence before the introduction of the term 'retrogressive' gives the only real substantive clarification – that progressive realisation 'imposes an obligation to move as expeditiously and effectively as possible towards [the full realisation of the ICESCR rights]'.

If as the dominant view implies, this sentence was to be viewed as the end of the consideration of progressive realisation before the Comment moved on to consider a new and somewhat separate obligation of non-retrogression, there would be several matters outstanding. Why was there so little clarification given as to the content of the progressive realisation obligation, despite the CESCR's insistence that progressive realisation was a concept full of content and meaning? Why, despite introducing progressive realisation as a 'necessary flexibility device', does the General Comment only elaborate upon the obligations that derive from it (expeditious and effective progression), and not touch upon the flexibilities afforded to States?

A further important implication of viewing progressive realisation and retrogression as sitting separately from one another is that there would be no discussion of the maximum of

[100] CESCR, *General Comment 3* (n 1) para 9 (emphasis and annotation added).

available resources attached to progressive realisation. If the CESCR intended retrogression to sit as a separate head of obligation then the paragraph should be read as subdivided into a section on progressive realisation and a section on retrogression. Yet the crucial obligation regarding the maximum of available resources, which appears linked to progressive realisation in the ICESCR itself, only appears once in the paragraph – in relation to retrogression.

However, the alternative (and better) reading of the final sentence is that it represents not the establishment of a new doctrine of non-retrogression, but rather a continuation of the CESCR's elaboration upon the meaning of progressive realisation. This way, non-retrogression can be seen as a 'component' of the obligation to progressively realise. In particular, 'retrogression' in the context of General Comment 3 can be read as describing the conditions for a violation of the obligation to progressively realise.

If, as the penultimate sentence of paragraph 9 of the General Comment indicated, successful progressive realisation entailed moving 'as expeditiously and effectively as possible', then a retrogressive measure was something less than that. In detailing the boundaries and obligations of progressive realisation the CESCR sought to outline what successful progressive realisation entailed, but also the circumstances in which a violation of that obligation would be found. Thus, the introduction of the 'retrogressive measures' term was used to denote a prima facie violation of the obligation to progressively realise. The Committee noted that if States were to progress at a pace or effectiveness less than a notional optimum (i.e. they failed to expeditiously and effectively progressively realise the rights and took a retrogressive measure), then certain conditions had to be demonstrated in order to avoid a finding of violation.

The conditions that States had to fulfil were; carefully considering the measure, justifying the measure by reference to all of the other ICESCR rights, and ensuring that the maximum available resources were being used. These conditions were not particularly stringent and could have reasonably been fulfilled by, for example, a proper process for the adoption of the measure (for example in a State legislature), a human rights impact assessment,[101] and the full use of resources. This suite of measures seems broadly proportionate to the gravity of the offence, if it was the intention of the Committee to define a retrogressive measure as a less-than-optimum (or non-progressive) measure. The overall dynamic that this would have established was one of 'comply or explain'. It required States to demonstrate that they

[101] Even accounting for the fact that these impact assessments are a relatively recent development, a State undertaking an analogous consideration of the implications of a *prima facie* retrogressive policy would likely satisfy this condition.

had moved as 'expeditiously and effectively as possible' towards realising the ICESCR rights or to justify why they had failed to do so.

This approach would have offered a true clarification to the problematic progressive realisation doctrine. This system of obligations was closely linked to the contents of the Covenant and was unlikely to upset the institutional stability that had been nurtured by the newly formed CESCR for the previous four years. It also directly addressed the problems that had been encountered in vague State reporting. This clarification of progressive realisation detailed clear routes for the rigorous examination of State reports no matter whether States wished to defend their record or plead otherwise. It delivered on the promise of the progressive realisation doctrine to offer both 'flexibility' and 'clear obligations'. Perhaps most importantly, it provided an uncomplicated route to finding and declaring a violation of the obligation to progressively realise.

The simplicity of the regime ushered in by General Comment 3 can be seen in figure 3. Taking the curve to represent the notional 'expeditious and effective' optimum rate of progressive realisation, anything less than this rate (i.e. anything that fell into the grey shaded area) would be a *prima facie* retrogressive measure. It shows the close relationship between a breach of progressive realisation and non-retrogression.

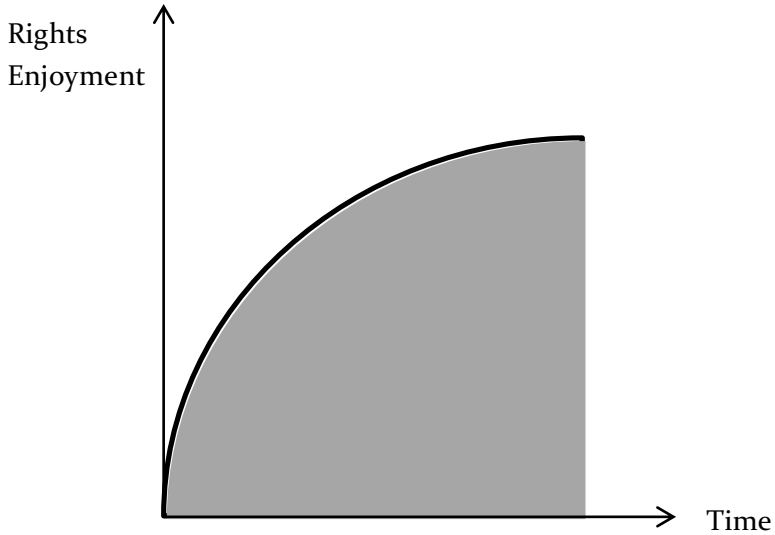

Figure 3

As a counterfactual, if the Committee in General Comment 3 really did intend to define a new doctrine of retrogression as a doctrine of 'backwards steps', then they did so in an ambiguous and inadequate way. If the CESCR intended to introduce the international community to the idea of a 'retrogressive measure' in General Comment 3, it would seem

surprising that it chose to do so in only a single sentence. Other novel concepts, such as the 'minimum core' received a much larger debut.[102] In its introduction of the new concept the Committee did not describe or indicate what constituted a 'retrogressive measure', beyond indicating that it is 'deliberate'. As this was a novel application of the term within the human rights and socio-economic rights realm(s), there was no evident meaning for the term. Did it mean an *intention* to go backwards (regardless of the result)? Was retrogression to mean an on-the-ground deterioration in rights protection? Could 'legal' measures, lauded by the Committee as 'highly desirable and in some cases […] indispensable',[103] constitute retrogressive measures? What relationship did the 'retrogressive' term have with the well-established term 'regressive'?

Rather than address these definitional questions (the 'what' question) or provide clarification by means of clear examples, the CESCR chose to focus on the question of when such measures were permissible. The Committee outlined a number of circumstances that would have to exist for such measures to be permissible (careful consideration, full justification by reference to other ICESCR rights, and the full use resources). This uncertainty on the 'what' question has continued in the CESCR's work. Elucidation has generally come through the addition of ill-defined justificatory criteria, rather than an exposition of the nature of retrogression itself.[104]

The above analysis points away from the predominant view of a single non-retrogression doctrine, or the view of General Comment 3 as a substantive innovation within the ICESCR. Neither of these can fully account for both the factual-contextual matrix and the substance of the CESCR's brief statement on the subject. It seems clear on this account, that the introduction of the phrase 'retrogressive measure' was intended to augment the weak existing understanding of the progressive realisation obligation. Thus the retrogression of General Comment 3 looks most like a component element of progressive realisation. The understanding that should be accepted of that early non-retrogression 'doctrine' is one that sees its functioning as subsumed within, and an integral part of, the functioning of progressive realisation; i.e. retrogression meant a violation of the obligation to expeditiously and effectively progressively realise.

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[102] Consisting of a paragraph of 255 words and 14 lines, compared to retrogression's 47 words and 3 lines. On its *debut*, the Respect, Protect, Fulfil typology received an introduction of 178 words and 15 lines; in CESCR, *General Comment 12* (n 87) para 15.

[103] CESCR, *General Comment 3* (n 1) para 3.

[104] Nolan (n 4) 47.

3.3.2. The 'Corollary' Model

The Corollary model is best – if crudely – described as seeing non-retrogression as the opposite of the progressive realisation obligation. In the simplest of terms, progressive realisation requires states to go 'forward' in their rights protection and non-retrogression regulates the instances when that protection goes 'backward'. Of course, it is more complex than this; holding a mirror up to progressive realisation would not show the doctrine of non-retrogression.

This Corollary concept is distinct from the Component model, as a corollary obligation (or doctrine) can be seen as one which is strongly implied by another obligation, but which sits separately. As such, a corollary obligation can take on its own semi-distinctive identity but would remain solidly grounded in (and attached to) another obligation. The purpose of a corollary obligation might be to fill a (perceived) gap in the original schema of obligations. Whereas a component is a minor innovation that could conceivably have been envisaged by drafters of the original obligation, a corollary is a more significant innovation and might represent an area not addressed in the drafting process.

The 'corollary' model of the doctrine of non-retrogression has dominated discussions[105] for a large part of the last two decades.[106] For the most part, the Corollary conceptualisation is well-founded and I argue that some six statements of the CESCR that can be appropriately categorised in this way.[107] These six Corollary statements share a common construction. Each notes that there is a strong presumption[108] against deliberate retrogression, and to be permissible such measures must be justified by reference to the totality of rights, place the burden of justification upon the State, and require the consideration of alternatives.[109] There are only minor differences between these 'corollary' criteria and the previous criteria

[105] A selection of those that have employed this model are Nolan, Lusiani and Courtis (n 4) 123; Scott (n 88) 81; Nolan (n 88) 256; Noriega (n 88) 172; Otto and Wiseman (n 88) 44.

[106] It seems that the first clear separation of progressive realization and retrogression into separate (corollary) heads of obligation occurred in 1997 with the Maastricht Guidelines; 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (SIM 1998) s 14.

[107] CESCR, *General Comment 13* (n 1) para 45; CESCR, *General Comment 14* (n 1) para 32; CESCR, *General Comment 15* (n 1) para 19; CESCR, *General Comment 17* (n 1) para 27; CESCR, *General Comment 18* (n 1) para 21; CESCR, 'General Comment 21' (n 62) para 65. See also Table 2, p79.

[108] Sometimes retrogressive measures are instead described as being impermissible 'in principle' or being 'not permitted'. CESCR, *General Comment 18* (n 1) para 21; and CESCR, 'General Comment 21' (n 62) para 65 respectively. See further Table 3, Chapter 8, p217.

[109] Each of these (except General Comment 17) also requires a context of the State Party employing the Maximum of Available Resources.

attached to the 'component' model above. Yet there are subtle other ways in which the doctrine changes between these two models.[110]

What distinguishes this approach from the component model discussed above, is its emphasis on the 'backwards' character of retrogression. At the core of this view is the notion that implicit in the obligation to progressively improve ICESCR rights realisation is an additional obligation not to take retrogressive steps.[111] While the previous section described retrogression as a slowing, or something less than an expeditious and effective optimum,[112] this 'corollary' model looks for a deeper deterioration of rights enjoyment to the point that they are enjoyed at a lower level than at an earlier point; what might be termed 'negative realisation'.[113]

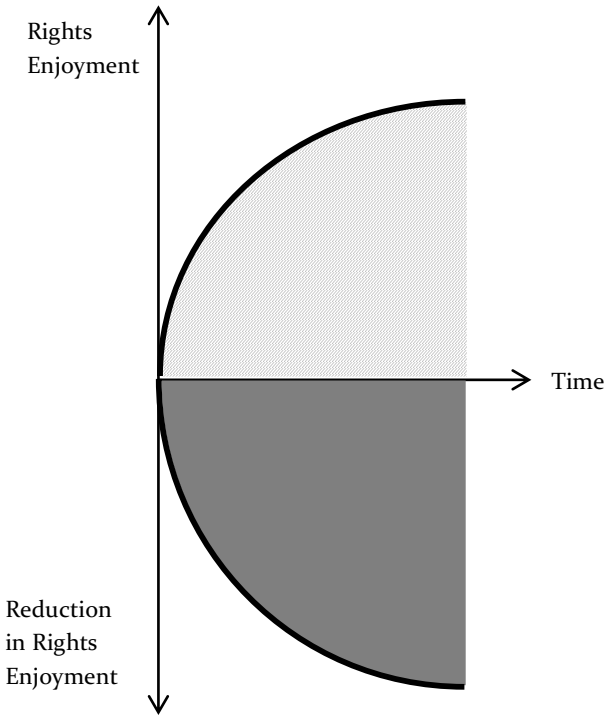

Figure 4

[110] In addition to the changes described below, the word used for 'retrogressive' in the Spanish translations of the General Comments also changes between General Comment 3 and General Comment 13. Originally described as 'las medidas de carácter deliberadamente *retroactivo*', later the phrase 'medida *regresiva*' is used. The original version of the General Comment was produced in English, however the difference in terminology will remain in Spanish-language uses of the General Comments. CDESC, *Observación General 3: La Índole de Las Obligaciones de Los Estados Partes* (UN Doc E/1991/23, 1990) para 9; CDESC, *Observaciones Generales 13: El Derecho a La Educación (artículo 13 Del Pacto)* (UN Doc E/C12/1999/10) para 45 (emphasis added).

[111] See for example Aoife Nolan and Mira Dutschke, 'Article 2 (1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) 3 European Human Rights Law Review 280, 280, 282.

[112] Logically, it is possible to be less than fully 'expeditious and effective' and still to improve standards. It is not clear that such a scenario would entail the finding of a breach of the 'corollary' doctrine, as there would be no 'backwards' step *per se* in rights standards.

[113] The Committee itself has used such a 'backwards steps' conceptualisation in its work; CESCR, 'Report on the Forty-Eighth and Forty-Ninth Sessions' UN Doc E/2013/22 para 12; CESCR, 'Report on the Eighteenth and Nineteenth Sessions' UN Doc E/1999/22 Day of General Discussion, para 507.

This is a substantial alteration to the simple 'progressive realisation/ breach' structure of the Component model. Representing this doctrine diagrammatically (figure 4) demonstrates the distinction. Here the CESCR were looking for an actual reduction in rights protection (rather than a slowed realisation). In the diagram the top curve continues to represent the optimum level of rights realisation. It is clear that there logically remains an area where States might realise rights too slowly (the light grey hatched area), but not actually reduce the protection of rights (the area represented by the dark grey area). The Corollary model leaves a space for the Committee to chide States for inadequate progress, without condemning them for material reductions in rights protections. In doing so, the progressive realisation obligation retains its own highly flexible content which can be monitored. Besides the content of retrogression and progressive realisation, however, there remains a 'gap' between them. This, in effect, leaves a further type of measure implied; stagnation.[114] Of course, the acceptance of this as another class of State action would mean the existence doctrines of both stagnation and retrogression that were without direct grounding in the ICESCR.

Life is not as simple as graphs, however. The notion of an optimum rate of progressive realisation is bound to stay just that – a notion. Determining an optimum policy route for any given country is well beyond the current state of knowledge. Yet, this is not to say that such an optimum scheme is not useful. There are frequently situations where States allow rights realisation to progress but at a (painfully) slow rate. The example of women's equal pay is an often cited one. Although the gap between rates of pay is generally[115] closing, we are told that it will take many more years (or until 2058 for the women of the United States).[116] This is progress, but perhaps not 'optimum' progress, and would most likely fall into the gap left by the Corollary model.[117]

This corollary approach, certainly in an abstract sense, has much to recommend it. In the early appearances of the doctrine in the CESCR's work there are close ties between the criteria for determining a retrogressive measure and the terms of the Covenant as a whole. This substantively expanded the obligations that flowed from article 2(1), while maintaining

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[114] *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities* (UN Doc A/HRC/13/29 2009) para 67; CESCR, 'MAR under OP' (n 2) para 9.

[115] Although in 2013 the gap widened in the UK; 'The Gender Pay Gap' (*Fawcett Society*) <http://www.fawcettsociety.org.uk/our-work/campaigns/gender-pay-gap/> accessed 20 September 2016.

[116] Institute for Women's Policy Research, 'The Status of Women in the States: 2015 Employment and Earnings' (2015) 7.

[117] This highlights the more strategic issues of advocacy and enforcement that go unaddressed. Where should the CESCR and civil society focus their energies in the face of such a regime? On the one hand, retrogression would seem to be a more severe deprivation of rights, but ignoring this kind of slow progression falling into the 'gap' might allow stubborn and intractable injustices to have a longer lifespan.

a solid legal basis and without taking the political-institutional risks of attempting to establish a doctrine that was without roots in the ICESCR.

In the early work of the CESCR, there are few grounds for disagreement with this conceptualisation. The rough implication that the ICESCR obligation to progressively improve contains a 'strong presumption against'[118] backwards steps is intuitive. A requirement that alternatives[119] should be considered before enacting a backwards step can be mapped onto the strong language of article 2(1) ('all appropriate means'). That such backwards steps should be justified by reference to other rights[120] seems well grounded in the progressive realisation article as it echoes the obligation to work towards the 'full realization of the rights' recognized in the Covenant.[121] Placing the burden on States of proving that such retrogressive measures meet these requirements[122] is a clearly pragmatic step that is implicit in the notion of the State as primary duty bearer. Finally, the obligation to use the maximum of available resources is also explicit in article 2(1)[123] and so it can only be seen as an supplement to non-retrogression, not a new part of it.[124]

This version of the doctrine mirrors the parent obligation of progressive realisation in most respects. There is one anomaly, however. The condition that backwards steps have to be 'deliberate' in order to be considered as retrogressive is not readily reconcilable with the progressive realisation obligation (or any other for that matter).[125] That measures are to be 'deliberate' if they are to be found to be retrogressive is best explained as being a hangover from the early General Comment 3 regime. However, in the new regime the condition can be seen as introducing a degree of flexibility. This flexibility introduced by a 'deliberateness' requirement for backwards steps, avoids the prospect of the CESCR being forced to find a violation of the Covenant where it feels that a State had little culpability for the backwards move. Although an artefact of the previous doctrine, the flexibility afforded to the CESCR warrants the continued inclusion of the word. The meaning of 'deliberate' remains ill-

[118] CESCR, *General Comment 13* (n 1) para 45.

[119] ibid.

[120] ibid.

[121] *International Covenant on Economic, Social and Cultural Rights* (n 42) art 2(1).

[122] CESCR, *General Comment 13* (n 1) para 45.

[123] *International Covenant on Economic, Social and Cultural Rights* (n 42) art 2(1).

[124] CESCR, *General Comment 13* (n 1) para 45.

[125] Nolan also highlights the Committee's silence on the meaning of 'deliberate' as problematic, while the Special Rapporteur on the Right to Water and Adequate Sanitation has sought to emphasise the duties of States even where retrogression is not deliberate; Nolan (n 4) 47; Special Rapporteur on the human right to safe drinking water and sanitation (n 3) para 47. See further discussion below at Chapter 8, pp211-213.

defined in the retrogression context, and its continued inclusion allows the CESCR to treat progressive realisation (and non-retrogression) with a degree of 'real world' flexibility.[126]

With non-retrogression in this form, there is little departure from the ICESCR obligations. As a corollary to progressive realisation the doctrine addressed a basic scenario, namely; what does progressive realisation have to say about instances where rights protection is going backwards rather than forwards? In answering this question, the doctrine of non-retrogression remained closely connected to the contours of the progressive realisation obligation, while filling a gap left in it. However, perhaps inevitably, the doctrine also took on an identity of its own, with a separate name and separate normative guidance. This semi-separate identity allowed the doctrine to move smoothly away from the obligations that were entirely rooted in progressive realisation and began the transition towards a composite doctrine.

3.3.3. The 'Composite' Model

While the Component and Corollary models of non-retrogression maintain a close connection to the progressive realisation obligation, for a brief period in 2007 the CESCR moved away from such a direct link. In both its *MAR under OP*, and in General Comment 19 the Committee adopted a Composite approach. [127] Although the approach might be revived in future, its period of influence so far has been short lived as in November 2009 there was a move back to the Corollary conception of non-retrogression in General Comment 21.[128] It is conjecture, but nonetheless interesting, to suggest that the reversal in position that took place might have been a result of the financial and economic crises which broke in 2007/8.

The structure of the Composite model builds on and intensifies the beginnings of divergence that took place under the Corollary doctrine. While the two models of non-retrogression outlined above envisaged the doctrine as embedded within (component model), or as a mirror of, progressive realisation (corollary model), the 'composite' model goes much further. Non-retrogression under this model can be defined as a composite of obligations that are derived from the progressive realisation obligation and a number of other ICESCR rights and general principles.

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[126] CESCR, *General Comment 3* (n 1) para 9.

[127] CESCR, 'MAR under OP' (n 2) para 9-10; CESCR, *General Comment 19* (n 1) para 42.

[128] CESCR, 'General Comment 21' (n 62) para 65.

The understanding of a composite obligation advanced here is relatively self-explanatory, and is defined as an obligation (or a set of entangled obligations) that is constituted of several other State duties. Little substantive innovation is implicit in this kind of obligation, as it is a collection of other substantive obligations. Rather, the innovation in crafting a composite obligation lies in the novel collection that takes place; the choice of which obligations to collect. Grouping obligations in such a way requires clear articulation of the boundaries of the chosen composite and perhaps also, the reasons for that particular collection of obligations. Without such clarity, it is possible that a large, confusing and ill-defined composite of conflicting obligations might result. If such issues are avoided, there is significant potential for the promotion of interdependence that can occur through the absorption of other relevant obligations. Cross-fertilisation and consistency of obligations would seem to be a natural result.

The versions of non-retrogression advanced by the CESCR in its *MAR under OP* statement and in General Comment 19 can be thought of as composite models of the non-retrogression obligation. Although each of these two CESCR documents outlines a different set of criteria to be used in defining a breach of the obligation (see table 2 above), each is demonstrably a composite of a number of ICESCR obligations, human rights principles and procedural protections. It is difficult or impossible to see the non-retrogression doctrines in these two documents as wholly or even predominantly linked to the progressive realisation obligation.

In General Comment 19 the CESCR adds seven further aspects to the criteria that had been consistently used in the Corollary model. On the one hand the composite doctrine of non-retrogression includes a need for reasonable justifications, participatory decision-making, independent review, and respect for the minimum essential levels of rights. On the other hand, this composite looks (very) negatively upon discrimination, measures having a sustained impact upon individuals and groups, and unreasonable impacts. These conditions, although separate to progressive realisation, can be related to other obligations and principles of the ICESCR. That the Covenant contains obligations of non-discrimination[129] and minimum core obligations[130] is well-established. The rights of participation, the requirement of reasonableness, and the mitigation of long-term effects can also be located in the ICESCR values or in ESR practice more broadly.[131]

[129] *International Covenant on Economic, Social and Cultural Rights* (n 42) arts 2(2) and 3.

[130] CESCR, *General Comment 3* (n 1) paras 10-11.

[131] For a number of examples of such values being present see; Sepúlveda (n 4) 364, 337ff; Saul, Kinley and Mowbray (n 28) 634.

The *MAR under OP* statement also contains a composite doctrine of non-retrogression, albeit a differently composed one. In fact the statement accounts for nested applications of non-retrogression in two separate scenarios; 'normal' scenarios of retrogression, and instances where a State uses '"resource constraints" as an explanation for any retrogressive steps taken'.[132] In respect of the first of these scenarios (where resources are not at issue), the CESCR essentially repeats the Corollary model. However, a composite is outlined for use in cases where a State claims it is operating under resource constraints. In such scenarios the Committee will additionally consider 'the country's level of development', 'whether the situation concerned the enjoyment of the minimum core', 'the country's current economic situation', 'the existence of other serious claims on the State party's limited resources', any 'low-cost options', and 'whether the State party had sought cooperation'.[133] Many of these criteria for assessment seem to be an explication of how the CESCR might assess compliance with the Maximum Available Resources obligation rather than conditions that are restricted to application in the context of non-retrogression. However, there is also a clear inclusion of the articles on international cooperation,[134] the minimum core obligation,[135] and to a lesser extent the flexibility given to developing countries and their economic situation.[136]

This approach takes the doctrine of non-retrogression to a number of new destinations. *First*, it disturbs the 'roots' of the doctrine. With no mention of retrogression in the ICESCR itself, most aspects of the legitimacy, legality and force of the doctrine rely on a solid connection to another part of the Covenant. As is argued above, it is possible to locate a connection to the ICESCR, but the link is not straightforward and the CESCR has not demonstrated it. *Second*, while the expansion of the criteria attached to the doctrine might appropriately promote human rights principles, it is unlikely to make monitoring easier. Under General Comment 19, for example, the Committee would require accurate information on some twelve areas including some highly complex aspects in order to properly make a finding of impermissible retrogression. *Third*, the shift towards a composite approach changes the emphasis of non-retrogression. Practically, the CESCR would not be carrying out an exacting examination of (non-)compliance with a doctrine, but rather would assess State actions *in the round* to look for a (composite) deterioration of human rights. In other words, the composite model dilutes focus sufficiently to move the

[132] CESCR, 'MAR under OP' (n 2) para 10.

[133] ibid para 10.

[134] *International Covenant on Economic, Social and Cultural Rights* (n 42) arts 2(1) and 11.

[135] CESCR, *General Comment 3* (n 1) paras 10-11.

[136] *International Covenant on Economic, Social and Cultural Rights* (n 42) art 2(3).

centre of analysis away from the 'measure' alleged to be retrogressive, and towards the context of its adoption.

3.3.4. The 'Un-Coupled' Model

The Un-Coupled model of the doctrine highlights the relinquishment of a predominant base in the content of the ICESCR. Although such a doctrine might well support the promotion of ICESCR rights (as endorsing social democracy or installing human rights activists in government might) the connection to the terms of the Covenant is lacking. The CESCR began a trend of such Un-Coupled doctrines in its Letter to States.[137] This and other interventions can be conceptualised as being Un-Coupled from the ICESCR as much of their content departs so markedly from the Covenant, and instead draws inspiration from a broader range of sources.[138]

Here, the term 'Un-Coupled' is taken to describe a doctrine separated from its legal basis. Such separation does not necessarily damage the utility of the doctrine in promoting ICESCR rights,[139] but on a legal level there are clear problems. Such a tentative (or non-existent) legal basis might be counteracted by strengths elsewhere that can contribute to the legitimacy of the doctrine (for example a demonstrable consistency with the demands of the ICESCR) and validate it as a self-supporting principle. The Un-Coupled doctrine is substantively innovative and raises new tests and issues of policy.

A number of traditional ICESCR concepts do remain in the Letter to States, General Comments 22 and 23, and in the Statement on Public Debt. Features such as the requirement of non-discrimination and – in most of these un-coupled versions – the need to satisfy the minimum core remain present.[140] However, there are also significant departures in these documents. For example, the binding nature of the ICESCR would seem to be subordinated when its obligations are noted in the Letter as 'guideposts' for States. Elsewhere, these Un-Coupled versions note that to justify retrogression State must ensure measures are temporary, necessary and proportionate.[141] The first of these departures notes that the ICESCR provides guideposts for State action. This is in direct contradiction of the

[137] Chairperson of the CESCR (n 2).

[138] CESCR, *General Comment 22* (n 1) para 38; CESCR, *General Comment 23* (n 1) para 52; CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (n 2) para 4.

[139] Although in this case the separation and content of the Letter to States is concerning; for a full discussion see Chapter 6.

[140] Although even crediting these as *ICESCR* concepts might be a stretch, with non-discrimination a cornerstone of the human rights system generally, and the minimum core expressly linked to ILO standards in the letter. The minimum core requirement is not included in General Comment 22.

[141] Chairperson of the CESCR (n 2).

CESCR's long-standing argument that Covenant is neither a bundle of objectives, nor a statement of principles, but is a justiciable and legally binding text.[142] Additionally, the requirement that retrogressive measures be temporary, necessary and proportionate although clearly inspired by other (human rights) instruments[143] is without foundation in the ICESCR.[144]

The abdication of a basis in the ICESCR is troubling as the size of the challenge that can be mounted by such an a-legal doctrine is likely to be drastically reduced. This is especially disturbing where non-retrogression is concerned; how far can a doctrine without a legal basis make demanding (with potential to be radically demanding) claims on State resources? While it is possible for retrogression to lack a legal-doctrinal basis, and still retain some soft-law basis by virtue of the authority of the CESCR, this would leave the legality of the doctrine highly contingent. As discussed above,[145] it is most likely that the work of the CESCR derives legal authority as a result of the Committee's unique position as interpreter of the ICESCR. This significantly ties the CESCR to the Covenant; it is not a creator of the law, merely an interpreter of it. To maintain a legal authority, the CESCR would need to demonstrate how the Un-Coupled doctrine is a valid interpretation of the ICESCR.

3.4. The Core Purpose of Retrogression

It becomes evident from this identification of the multiple conceptual models of non-retrogression, that a core *purpose* for the doctrine is absent. The four conceptual models as developed, demonstrate diverse conceptual footings upon which the doctrine has rested through the years of its development. Yet, beyond mere conceptual diversity, the models show the varied purposes for the doctrine of non-retrogression. Some brief distinctions can be drawn out here. The strong connection between the Component model of the doctrine and the progressive realisation obligation can be seen have a purpose of strengthening the latter obligation. Separately, the Corollary model, while remaining focussed on promotion of the progressive realisation obligation as a secondary purpose, additionally re-purposed retrogression to address reductions in rights protection. The purpose of the Composite

[142] See a strong statement of this in *State Party Report under the International Covenant on Economic, Social and Cultural Rights: United Kingdom* (UN Doc E/C12/1/Add79 2002) para 11.

[143] In particular the ICCPR and the ECHR; Human Rights Committee, *General Comment 29: States Of Emergency (Art 4)* (CCPR/C/21/Rev1/Add11 2001); *European Convention on Human Rights* (1950) art 15(1).

[144] See further Chapter 6 for a full discussion of this departure.

[145] At section 3.2.1..

models can be seen unifying the ICESCR obligations, while the Un-Coupled model can be cast as a model to offer (a somewhat extreme) pragmatic flexibility.

The lack of core purpose for the doctrine, which arises when comparing these four models, results in difficulties in several areas. An absence of purpose has meant that non-retrogression has developed without a consistent direction. In turn this has led to inconsistent content for the doctrine. Without a clear guiding value, or core purpose, the CESCR's task of developing its successive General Comments and Statements is more difficult. Further, without a core purpose the doctrine has suffered from a lack of core content, too. This lack of core content can be seen in the difficulties with identifying the core space in which the doctrine operates (i.e. to what types of activity it applies), and with the inconsistent justificatory criteria for it.

By confirming a strong purpose for non-retrogression, the scale and frequency of the doctrine's modifications could be mitigated. Rather than radical shifts in the doctrine's construction in order to address transient economic or other circumstances, such alterations would have to be related to an overarching and more static purpose. Similarly, with a settled purpose that set the doctrine in a firm relationship with the ICESCR, concerns about a weak legal basis would be somewhat addressed. Finally, the problems raised around the doctrine's practical effectiveness can also partly be attributed to the absence of a purpose. The changeability and inconsistency in the doctrine's content damages efforts to build civil society capacity and understanding, or to mount rigorous claims of retrogression.

A clearly defined purpose could do much to add stability, strengthen retrogression's legal basis and improve its practical effectiveness. It could provide a direction for the future development of the doctrine and act as a heuristic device in guiding the appropriate application of the retrogression obligations to States' situations. Addressing these problems with the doctrine would, in turn, clearly contribute to retrogression's longevity and credibility.

There are no common *purposes* across the conceptual models, but neither are there other common *characteristics* which are well-defined or unique to the doctrine of non-retrogression. Thus, for example, it is true that each of the four conceptual models of the doctrine of non-retrogression highlights modifications made to the original ICESCR

obligations accepted by States.[146] Further, all four of the models have a connection with the Maximum Available Resources obligation,[147] and rely on some assessment of progress. However, these general observations would likely hold for any socio-economic right, and do little to further an assessment of the content of the doctrine. Beyond these broad (almost trite) observations, the doctrine can be seen as fragmented and capricious; it applies to different types of action and with different justificatory criteria.

The first question where it is claimed that a State has enacted a retrogressive measure, would be to establish the prima facie existence of such a measure, before moving on the consider if it was 'permissible'.[148] While the dominant image of the doctrine associates it with 'backwards steps' by States, it is argued above that the Component model is not in fact only concerned with 'backwardness'. In addition to backwardsness, the Component model is concerned with all less-than 'optimum' rates of progression on rights enjoyment. These two spheres represent distinct but overlapping classes of State action. It is clear that where there is a fully 'backwards step' an application of all models of the doctrine would be triggered. However, where there is no backwards step but merely weak progress there would seem to be a role for the Component doctrine but not for the others. Further, in establishing what might be a *prima facie* case of retrogression the CESCR has noted that a prerequisite is State 'deliberateness'; that is the CESCR has noted that this is the case *most* of the time.[149] Elsewhere the CESCR has left this element untouched, making it hard to identify a core type of measure that could possibly be retrogressive. These are important distinctions as they demonstrate the difficulty in establishing a core class of State actions that are even *potentially* retrogressive. As such, from the very start of any process of assessing possible retrogression there is uncertainty about where and when the doctrine might apply.

Even brushing past the substantial issue of when to apply the doctrine, there is remarkably little consistency on the other side of the equation, on what exactly the justificatory criteria to be applied are. An indication of this lack of consistency is the nine separate and different configurations of the doctrine that are seen across the CESCR's work.[150] Even grouping these

[146] In the text of the ICESCR there is no concession afforded to States which, for whatever reason, failed to progressively realise ESR. Flowing from this strict picture of the obligations as set down in the ICESCR, the doctrine of non-retrogression in any form can only be seen as a softening of the Covenant obligations. All of the doctrine's versions offer States the possibility of justifying a failure to progressively realise in the way that the Covenant demands.

[147] *International Covenant on Economic, Social and Cultural Rights* (n 42) article 2(1).

[148] This dynamic springs from the description of the 'strong presumption against' retrogression or such measures being impermissible 'in principle'; see, eg, CESCR, *General Comment 13* (n 1) para 13; CESCR, *General Comment 18* (n 1) 21.

[149] This condition being missing from, Chairperson of the CESCR (n 2); CESCR, 'MAR under OP' (n 2); CESCR, *General Comment 16* (n 1).

[150] See Appendix B.

configurations to look at their conceptual underpinnings as is done above, there are no less than four potential conceptual roots of the doctrine. Determining the core content of the doctrine in the context of such a lack of consistency is simply not possible. Not a single one of the criteria (even those that might seem most fundamental) are applied across all versions of the doctrine. This only leaves a majoritarian estimation of the core criteria attached to 'the' doctrine, where one might identify an aspect of the doctrine that is present in *most* elucidations as comprising the core. Such estimations, if carried out, would seem to adopt precisely the approximation approach to non-retrogression that has so far been challenged here. Further, beyond these methodological issues there is little qualitatively enlightening about assessing the core justificatory criteria of non-retrogression in this way. That the requirement that retrogression should be 'justified by reference to the totality of rights' is more persistently present than other criteria (present in nine of fourteen elucidations) is not indicative of its relevance to the core of retrogression. In these senses, the doctrine deconstructs itself by neither offering consistency, nor a normative direction onto which the inconsistencies can be mapped and explained.

This mixture of inconsistencies combines in an unfortunate manner. To employ an analogy from criminal law, there is no clarity about the nature of the offence or its definition, and the defences to the offence fluctuate. In practice, such an offence would not be allowed to continue to exist in criminal law, and if it did, prosecutions would not be taken. Of course, the level of detail normal in criminal law is not expected in General Comments, however the result remains much the same. There are indeed very few 'prosecutions' or – in human rights language – examinations of State actions as regards retrogression.[151] A more certain and productive path elsewhere is taken in, for example, the examination of the use of Maximum of Available Resources,[152] or scrutiny of potential discriminations.[153] This clearly points beyond the merely theoretically unsatisfactory nature of the inconsistencies, and towards the practical manifestations that result. [154]

It is clear that there is both a theoretical and practical need to resolve the inconsistencies within retrogression and equally that there is not an easy resolution to these inconsistencies. In such circumstances a return to the purpose that guides retrogression

[151] Where the Committee makes any finding at all related to retrogression, the language used is usually recommendatory. For example it 'strongly recommends that the State party reconsider' (CESCR, *Concluding Observations: Canada* (UN Doc E/C12/CAN/CO/4; E/C12/CAN/CO/5 2006) para 52.), or 'it notes that this planned law, on the face of it, represents …a retrogressive measure' (UN Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the CESCR: Chile' para 28), or 'reiterates its recommendation … that the social security reform …does not retrogressively affect' the rights (CESCR, *Concluding Observations: Germany* (UN Doc E/C12/DEU/CO/5 2011) para 21.).

[152] For example in, CESCR, *Concluding Observations: Iceland* (n 53) 6.

[153] For example in, CESCR, *Concluding Observations: Spain* (n 53) para 9, 13.

[154] The practical aspects of the subject are explored further in Chapter 8.

would be profitable. However, as highlighted above, there is also a lack of clarity in even this basic respect.

3.5. Conclusions

This chapter has deconstructed, on a relatively doctrinal level, the concept of non-retrogression. The sources that form the doctrine, their legal basis and their interrelation were all addressed. An inclusive view of the CESCR sources was adopted, with their contents taken as generally applicable, rather than as being limited to a specific right or context. The semantic stylings of retrogression were also discussed, with the use of the terms 'impermissible retrogressive measures' or 'steps' being preferred. The question of whether the regulation of retrogression amounts to a 'doctrine' or a 'mechanism' was discussed above at section 3.2.3.

These preliminary deconstructions provided the building blocks for the explosion of the 'single doctrine' view. The notion of a single unchanging entity was broken into nine versions (or combinations of criteria) which in turn were regrouped into four models, each with a distinct conceptual structure. These four conceptual footings cast the various stages of retrogression as a Component of progressive realisation, as a Corollary to progressive realisation, as a Composite bundle of ICESCR obligations, and an entity Un-Coupled from a firm basis in the ICESCR.

The shifting conceptual bases of retrogression caused difficulties in the final section which aimed to identify the core content and purpose of the doctrine. This final stage of the analysis grappled with the multiple inconsistencies in the doctrine and a number of different purposes. It was argued that there was no core purpose for the doctrine, and further that there was no consistency to be found in the criteria of the versions of the doctrine. This is a vital underpinning for later chapters. In particular, the next chapter picks up this task of finding an overarching purpose and construction for the doctrine.

There is a radically different approach needed to retrogression in light of the fractured construction described here. Whereas 'tinkering' might have been appropriate if retrogression could be viewed as a single doctrine, after observing the multiple splinters of the concept above, it is clear that a more substantial (re)construction is needed. This process begins in the following chapter, with the construction of a purpose for retrogression.

Chapter 4

(Re)purposed and (Re)constructed Retrogression

4.1. Introduction

This chapter begins the radically different approach to retrogression that the previous chapter argued was needed in light of the doctrine's fractured construction. This culminates in the (re)purposing and (re)construction of the doctrine in sections 4.4. and 4.5.. However, before embarking on these (re)constructions, the chapter addresses the relationship between retrogression and other key ICESCR concepts. Addressing these relationships and the doctrine's place within the Covenant prior to undertaking the task of (re)construction is important as those interactions are significant in shaping the purpose and construction given to the doctrine later on.

In spite of all of its flaws and lack of direction the doctrine of non-retrogression has something to add to the enforcement and normative security of the ICESCR obligations. The process of fragmentation and the lack of purpose has meant that the doctrine has lacked a guiding value in its development and has been without a set of values to direct its application to country situations. This disarray and lack of direction consistently present throughout the history of the doctrine. This chapter addresses the causes and consequences of the doctrine's fragmentation and suggests a (re)construction of the doctrine in order to resolve or reduce its fragmentation in future. Beyond simply suggesting a (re)construction that can encourage consistency, however, the chapter proposes a doctrine that can address the failures of current versions of retrogression. This begins the process – taken up in the rest of the thesis – of stress-testing the (re)constructed doctrine, and highlighting the areas it can make most of a difference.

In the previous chapter in addition to it being argued that there is absence of a core purpose for retrogression, it was also shown that the doctrine has an uncertain legal basis, at best being constructed from the interpretative authority of the CESCR. The changeability and multiple renderings of the doctrine were also highlighted, as were questions about the doctrine's effectiveness and practical operation.

This chapter broadens that analysis to examine the doctrine's place within the Covenant. In doing so, it moves beyond attempts to frame retrogression primarily according to its internal workings (as was largely the undertaking of the last chapter) and instead orientates it according to key themes in the ICESCR. This involves a close look at the relationship between the key progressive realisation obligation and retrogression, and at the interplay

between the cornerstone 'respect, protect, fulfil' typology and the doctrine. Clarifying these relationships is central to the later tasks of the chapter; the repurposing and reconstruction of retrogression. Sections 4.2. - 4.4. below build upon the clarified image of the doctrines place within the Covenant and its lack of purpose to suggest new directions for retrogression. Following this is the case for abandoning the doctrine (or its terminology) altogether. Following this, the chapter turns to finding a coherent purpose for retrogression and defending that purpose on a number of grounds. The final part of the chapter puts this repurposing into practice by presenting a new direction for retrogression and discussing some of the key rationales behind it. It is suggested that a definition of retrogression that is linked to all kinds of action, including contributions to trends is needed.

4.2. Retrogression's Place

Few – including the CESCR – would grant the same level of attention or importance to the doctrine as they would to other general obligations such as the minimum core, progressive realisation or non-discrimination. In this context of subsidiarity, it is useful to understand how the doctrine relates to key overlapping obligations in the ICESCR. Through a process of relating the doctrine to anchor points in the Covenant, a better approximation of its function might be formed.

Put in simple terms, answers are needed to the questions: where does retrogression fit within the ICESCR; can it be described as an immediate obligation; how does it relate to other well-known typologies; and how does it relate to other obligations? Some of these questions have already been answered or can be answered briefly. However, clear replies to all of them are essential to framing the process of (re)constructing the doctrine's purpose and form.

For example, it has already been argued that the prohibition on retrogression is an immediate obligation not subject to the progressive realisation qualification.[1] Separately, it is also clear, *inter alia* from the strict framing of the CESCR's outputs, that the non-discrimination[2] and minimum core obligations[3] are not subject to the flexibilities offered by

[1] Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014) 64; Christian Courtis, 'La Prohibicíon De Regresividad En Materia De Derechos Sociales: Apuntes Introductorios' in Christian Courtis (ed), *Ni Un Paso Atrás: La Prohibicíon De Regresividad En Materia De Derechos Sociales* (Editores de Puerto 2006) 9.

[2] CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)* (UN Doc E/C12/2005/4 2005) para 42; CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 42; Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW.

the doctrine of non-retrogression. This is the correct position for the Committee to take as these are separate and free-standing obligations. For them to be subjected to the justification process of retrogression would damage their strong and immediate character. However, this is not to say that the relative importance of each obligation is clear, or that they could currently be placed on a hierarchy of significance.[4]

Nevertheless, other aspects of retrogression's position within the ICESCR require greater consideration. The sections below deal with two of those areas where retrogression's awkward place within the Covenant perpetuates. Addressed first is the relationship with progressive realisation and, secondly, the relationship with the tripartite typology is discussed. In the context of the current chapter these obligations are particularly important as they help shape later discussions of how a (re)purposed and (re)constructed doctrine might speak to progressive realisation and the various aspects of the tripartite typology.

4.2.1. Retrogression's Relationship with Progression

In lieu of authoritative guidance, there have been several scholarly attempts to clarify and simplify the CESCR's complex construction of the doctrine of non-retrogression. Within these academic accounts, there has been some lack of agreement and this might be viewed as sometimes adding to the complexity of the doctrine. As each is a product of its time and the CESCR is constantly reinventing the doctrine, these scholarly contributions can age quickly. In addition, the line between suggestion and description has sometimes been insufficiently bright, leaving ambiguity as to what is currently the case and what is proposed as a more successful approach. One of the most prominent differences in approach seen in the academic literature has been the approach to dividing the progressive realisation obligation from the obligation of non-retrogression. The following sections aim to unpack the approaches of Sepúlveda and O'Connell *et al* who have devoted particular space to this issue.

It should be emphasised that in what follows is only one possible reading of the respective scholars' understandings. Naturally, while the reading given here represents this author's view of the most accurate interpretation, there might be room for other appraisals. It is also emphasised that cross-comparisons between the accounts of retrogression (beyond those

[3] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' UN Doc E/C12/2007/1 paras 9-10; Chairperson of the CESCR (n 2).

[4] Aoife Nolan, Nicholas J Lusiani and Christian Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 145.

provided below) should be cautiously made as there is a complex web of overlapping and conflicting terminology.

4.2.1.1. Sepúlveda on Retrogression's Relationship with Progression

Sepúlveda, in her 2003 book,[5] discusses retrogression in the context of the article 2(1) obligations.[6] To understand her considered approach to the doctrine, it is necessary to briefly set out the context in which she sees the doctrine.

Sepúlveda conceptualises the ICESCR's progressive realisation obligation as comprising two corollary obligations; non-retrogression and continuous improvement.[7] This is a distinctive interpretation of article 2(1) insofar as it sees 'continuous improvement' and non-retrogression both being nested within progressive realisation. This contrasts with the traditional view of progressive realisation as the primary obligation beneath which sits a residual category of non-retrogression.[8]

Yet, what follows this division is more interesting in the current context. Sepúlveda suggests that the first obligation – to continuously improve – would largely be violated by omissions or passivity.[9] This can happen in two ways. First, where declining conditions in the State are met with State inaction there may be a breach. In her own words, Sepúlveda notes that 'States cannot tolerate a decline in the degree of protection afforded to a particular right without taking any action to try to redress or improve the situation'.[10] Sepúlveda cites the CESCR's use of the obligation where HIV rates increase without an adequate State response.[11] The second way, in Sepúlveda's account, in which States can breach their obligation to continuously improve is through inaction in the face of an opportunity to improve ESR conditions.[12] Here she cites the Committee's example of a stagnating minimum wage despite an improved economy. In both cases, there is essentially a concern with the gap between the possible and actual actions of the State (see figure 5 below).

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[5] Thus, she writes before a flurry of seven General Comments and Statements which address the topic. See further the timeline of the CESCR's interventions at Appendix A.

[6] M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 319ff.

[7] ibid 319, 321.

[8] See, eg, Sandra Liebenberg, 'The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa' (2001) 17 South African Journal on Human Rights 232, 251; Kam Chetty, 'The Public Finance Implications of Recent Socio-Economic Rights Judgments' (2002) 6 Law, Democracy & Development 245.

[9] Sepúlveda (n 6) 320.

[10] ibid 321.

[11] ibid.

[12] ibid 322.

Having framed the obligation to continuously improve in terms of inaction-despite-capacity, Sepúlveda moves on to consider retrogression. The definition of this obligation, she acknowledges, remains unclear.[13] Yet from the materials available to her, Sepúlveda notes that it is 'possible to argue' that retrogressive measures occur when there is a 'step back in the level of protection [of ESR] which is the consequence of an intentional decision by the State'.[14] Retrogression, in Sepúlveda's account, therefore requires both action and a reduction in ESR standards.

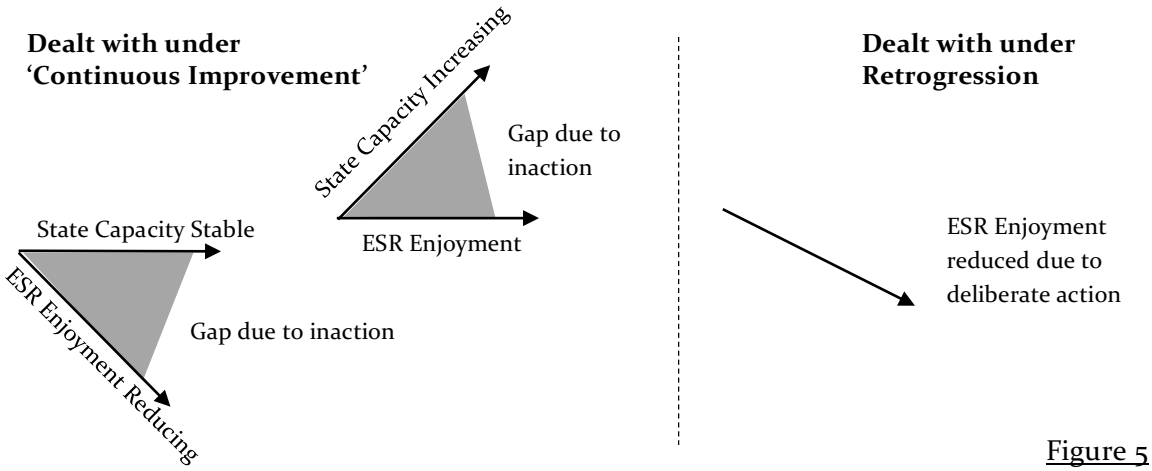

Figure 5

Taken together, it is clear that Sepúlveda sees the two classes of obligation being primarily divided by the action/inaction of the State rather than by changes in ESR enjoyment. Thus, she sees it possible to incorporate within 'continuous improvement', reductions in ESR attainment (that others would class as retrogression) *so long as* such reductions are the result of State inaction. The approach is solid, and deals well with some of the conceptual ambiguities of the CESCR's work. However, Sepúlveda's analysis raises a number of interesting points.

First, by centring her analysis on the action/inaction dichotomy, and associating retrogression with action, she runs into the classic critique of the malleability of these concepts.[15] As Nolan, Porter and Langford have argued, 'most examples of "inaction" can be recast as examples of "action"' and 'the question of whether or not a right is infringed should not depend on whether the situation complained of is seen as state action rather

[13] ibid 323.

[14] ibid.

[15] Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' [2007] Center for Human Rights and Global Justice, Working Paper Number 15, 11ff; see also, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP Oxford 2008) 66–70.

than inaction'.[16] Indeed, Sepúlveda's examples can be recast in exactly such a manner. While an increase in HIV rates increase without an adequate State response can be seen as State inaction, it can also be reframed as an active State choice to prioritise other areas.

The malleability of the action/inaction divide would have significant implications for the obligations States operate under. When a result occurs as a consequence of actions taken, under Sepúlveda's understanding this is to be classed as retrogression (which comes with flexibilities for States).[17] However, if a result is due to inaction then this would be engage the 'continuous improvement' duty (which contains no significant flexibilities). Following this approach would therefore entail a strong incentive for States to cast their failures as active-but-necessary in order to access the routes to justification that the doctrine of non-retrogression provides. It is perverse to treat State actions that lead to violations any less stringently than State inactions (as Sepúlveda's approach implies).

Second, Sepúlveda's interpretation of General Comment 4 emphasises a strong need for causation in relation to retrogression.[18] In the course of argument Sepúlveda cites part of the following passage:

> [i]t would thus appear to the Committee that a general decline in living and housing conditions, *directly attributable* to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.[19]

Although careful not to argue that it is conclusively the case, and in subsequent paragraphs noting a broader view of the causative link,[20] Sepúlveda highlights the Committee's phrase 'directly attributable' in this quotation. This leads her to suggest that retrogression must be a 'consequence' of an intentional State decision (a strong test of causation).[21] While the requirement of State intention can easily be derived from the frequent use of the term 'deliberate' in General Comments,[22] the same cannot be said of the inference related to causation. The 'directly attributable' formulation has not been invoked by the CESCR in any

[16] Nolan, Porter and Langford (n 15) 11–12.

[17] See, eg, Sepúlveda (n 6) 328.

[18] This issue is discussed further in Chapter 8, pp214-219.

[19] CESCR, *General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant)* (UN Doc E/1992/23 1991) para 11. (emphasis added)

[20] Broadening to include State measures that result in a 'direct *or collateral* negative effect' (emphasis added); Sepúlveda (n 6) 323; and in subsequent work Independent Expert on the question of human rights and extreme poverty, *Rights-Based Approach to Recovery* (UN Doc A/HRC/17/34 2011) para 18; Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 27.

[21] Sepúlveda (n 6) 323.

[22] To give three examples; CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) para 9; CESCR, *General Comment 13: The Right to Education (Art 13 of the Covenant)* (UN Doc E/C12/1999/10 1999) para 45; CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 32.

of its other General Comments; the closest connected use of this language being the use of the term 'attributable' without the word 'directly' and its more stringent connotations.[23] Further, in both of its uses of the term 'attributable', it is arguable that the CESCR does not connect the word to the retrogression context. While in General Comment 4 there is a mention of 'general decline', the doctrine of 'retrogression' is not mentioned anywhere in this General Comment.[24]

The importance of the above discussion lies in the consequences of applying a 'directly attributable' test to retrogression. Requiring such a strong connection between State action and the negative result (that requires not only a 'deliberate' move, but also a consequence that is 'directly attributable' to that move), increases the difficulty of proving State responsibility under the doctrine retrogression. In Sepúlveda's estimation, the step back would have to be a 'consequence' of State action. Such a stringent test of causation poses particular difficulties where there are multiple causes for a single backwards step.[25] In addition, this formulation would capture a much narrower range situations than the CESCR's usual assertion of State responsibility for 'any deliberately retrogressive measures'.[26]

Aside, perhaps, from her reading of the causation relationship, the way in which Sepúlveda defines retrogression is an entirely plausible reading of the CESCR's work. By focusing on the active nature of the CESCR's terms 'deliberate' and 'measure', she is able to draw the link between retrogression and State *action*. This provides a way of the dividing the article 2(1) obligations in an action/ inaction syntax that is familiar to human rights scholarship.

However, the division is not a perfectly neat one. In order to cast retrogression as being the result of State action, Sepúlveda places stagnation and backwards steps that are the result of State nonchalance, under the banner of continuous improvement.[27] Yet the more traditional focus on the nature of the result, rather than on the nature of the State action, usually leads all such backwards steps to be dealt with under retrogression, rather than under progressive realization. Thus in Sepúlveda's account, reductions in ESR standards can be dealt with either as a violation of the obligation to continuously improve (if the

[23] CESCR, *General Comment 7: The Right to Adequate Housing (Art 11(1) of the Covenant)* (UN Doc E/1998/22, annex IV 1997) para 5.

[24] Cf Colm O'Cinneide, 'Austerity and the Faded Dream of a "Social Europe"' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 195; O'Connell and others (n 1) 70. Leckie mentions retrogression and general decline as separate obligations; Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) Human Rights Quarterly 81, 99–100.

[25] Nolan, Lusiani and Courtis (n 4) 127–128.

[26] CESCR, *General Comment 3* (n 22) para 9.

[27] Sepúlveda (n 6) 320–322.

reduction is due to inaction), or as a violation of the obligation to avoid retrogression (if the reduction is due to a deliberate action).[28] This conception of the two obligations leaves an open and highly important question about another area of State activity. By combining the terms 'deliberate' and 'action' might States escape responsibility for *unintentional* actions?[29]

Thus, while Sepúlveda's analysis opens up a number of significant questions, her view of impermissible retrogression is relatively straightforward. It can be seen that the division between retrogression and 'continuous improvement' is made by State actions or inactions. It is grounded in an understanding of retrogression as involving *active*, *intentional* and *causative* State measures.

4.2.1.2. O'Connell et al on Retrogression's Relationship with Progression

In their work focussing on State budgeting in the context of international ESR obligations, Rory O'Connell, Aoife Nolan, Colin Harvey, Mira Dutschke and Eoin Rooney address the assessment of retrogression in relation to State budgets. Such budget allocations are an important case study in the operation of retrogression; both being a frequent cause, and a more empirically quantifiable example, of retrogression. In their work they acknowledge that 'progressive realisation is not simply reducible to resources but resources do play a [limiting] key role'.[30] This is an important reminder of the range of (almost) resource-free State actions that can be taken to progressively realise ESR or to prevent retrogression (such as legislating or revising existing policy).

By assessing a number of ESR budget analysis reports,[31] the authors are able to draw some conclusions about the prevailing views surrounding budgeting and retrogressive measures. Unsurprisingly, they see agreement in the literature that State expenditure to obstruct ESR improvement or existing enjoyment can constitute retrogression.[32] More subtly, the authors also find evidence that suggests agreement that a reduction in ESR expenditure despite 'stable/growing' need can constitute a retrogressive measure.[33] Extending this understanding to the converse position, this leads O'Connell *et al* to emphasise that

[28] See Figure 5 above (based on ibid 319–332.).

[29] See Chapter 8, pp211-213.

[30] O'Connell and others (n 1) 47.

[31] ibid 39.

[32] ibid 48 (table 2.6).

[33] ibid.

reduced resourcing can be justified if 'enjoyment of ESR continues to increase'.[34]

These and other aspects detailed in the research emphasise the need to focus primarily on changes to the enjoyment of ESR when assessing for retrogression, rather than only or predominantly on the upstream budgetary measures. Changes to budgetary expenditure, they note, can only ever be used as a 'proxy for what is important' (i.e. levels of ESR enjoyment).[35] O'Connell *et al* provide many reasons why identifying a (positive or negative) change in expenditure is not the same as identifying a (positive or negative) change in ESR enjoyment. These include; inflation, expenditure not leading to a proportionate change in realisation, demographic changes, and changes in need.[36] Such a results-based paradigm is less focused on whether the State is responsible for an action or an inaction.

These authors focus their idea of retrogression on decreased ESR enjoyment.[37] They thus depart from Sepúlveda's retrogression-by-action conception discussed above, noting at one point that '[housing related declines in ESR enjoyment] can constitute retrogressive measures if caused by deliberate *action or inaction* of the state'.[38] The distinction for these authors is therefore whether a decrease or an insufficient increase in ESR enjoyment is at issue. Where there is a case of insufficient progress in ESR enjoyment (i.e. where progress is not 'optimised'[39]), it seems that these authors would deal with the issue as a matter of inadequate progressive realisation. While, on the other hand, reductions in ESR enjoyment would be handled under the obligation of non-retrogression (see figure 6).[40]

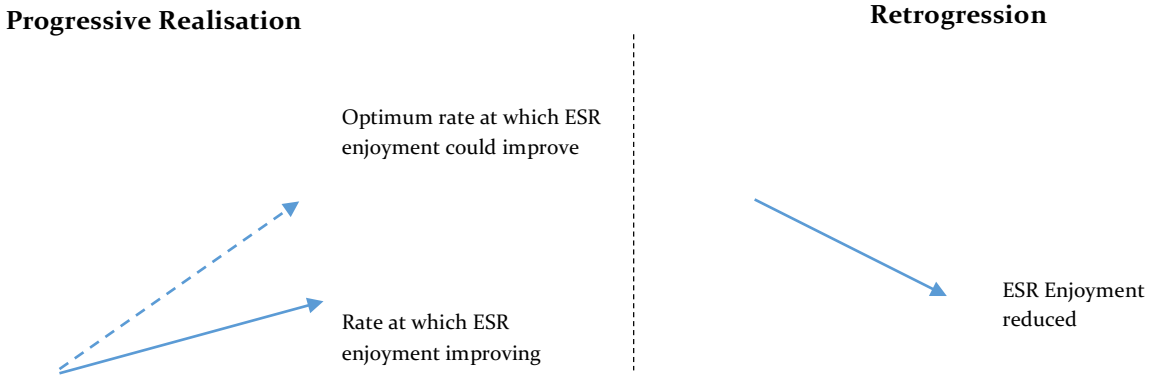

Figure 6

[34] ibid 48.

[35] ibid 57, 155–6.

[36] ibid 57.

[37] For example, ibid 48, 57, 156, 168.

[38] ibid 156 (emphasis added). Similar sentiments are visible in the authors' argument that the respect obligation entails both positive and negative obligations; ibid 47.

[39] O'Connell and others (n 1) 69.

[40] This also appears to be Scott's understanding in Craig M Scott, 'Covenant Constitutionalism and the Canada Assistance Plan' (1994) 6 Constitutional Forum 79, 81–82.

4.2.2. Non-Retrogression and Obligations to Respect, Protect and Fulfil

Another aspect of retrogression's place within the ICESCR regime that gives rise to difficult and abstract questions is its interaction with the tripartite typology. It is, of course, important to note the nature of the typology as an analytical device and that the ICESCR obligations are not intended to fit neatly into its categories.[41] However, there are significant questions about whether traditional views of non-retrogression can be differentiated from a 'respect' type obligation. An absolute answer to this question is currently not possible. There has been very little attention to these interactions and they are far from simple comparisons to make.[42] Thus far it has been argued that the obligations to respect and protect receive a similar level of scrutiny to the obligation not to retrogress.[43] Yet it is unclear whether the fulfil obligation is similarly scrutinised. The second indication of the complexity of these comparisons are the justificatory criteria attached to non-retrogression. It has been argued that the obligation to respect might not even be qualified by reference to resource constraints,[44] yet as has been discussed above, there are a plethora of justificatory criteria used in relation to retrogression. Indeed, such a different treatment of prima facie violations might render a comparison between the obligations nugatory. However, with the respect, protect, fulfil categorisation being so central to understandings of the ICESCR[45] it means that retrogression's unclear relationship with the typology produces a further uncertainty regarding the doctrine's place within the Covenant. As such, even engaging in a partial assessment has some value.

There is some difficulty in comparing accurately how non-retrogression fits with the respect, protect, fulfil typology as both are enunciated in multiple forms. For argument's sake (because, in this context, not much falls on which form is chosen), representative definitions of each have been taken from a recent General Comment of the CESCR.[46] For reference, the tripartite typology is commonly described by the Committee as comprising:

> three types or levels of obligations on States parties: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfil. The obligation to respect requires States parties to refrain from interfering,

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[41] Shue reminds us that such typologies are a 'ladder to be climbed and left behind'; Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn, Princeton UP 1996) 160.

[42] O'Connell and others (n 1) 92.

[43] Malcolm Langford and Jeff A King, 'Committee on Economic, Social and Cultural Rights' in Malcolm Langford (ed), *Social rights jurisprudence: emerging trends in international and comparative law* (CUP 2008) 502.

[44] O'Connell and others (n 1) 90–91.

[45] For example, it is included in many CESCR General Comments; CESCR, *General Comment 12: The Right to Adequate Food (Art 11 of the Covenant)* (UN Doc E/C12/1999/5 1999) para 15; CESCR, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (UN Doc E/C12/2002/11 2002) paras 20-29; CESCR, *General Comment 18: The Right to Work (Art 6 of the Covenant)* (UN Doc E/C12/GC/18 2005) para 22.

[46] CESCR, *General Comment 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a) of the Covenant)* (UN Doc E/C12/GC/21 2001) para 65 (retrogression), paras 48-54 (tripartite typology).

> directly or indirectly, with the enjoyment of the right[s]. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right[s]. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right[s].[47]

Dealing first with the synergies between retrogression and the respect obligation; the CESCR's understanding immediately demonstrates the close connection between the respect obligation to 'refrain from interfering' and a non-retrogression obligation to avoid backwards steps.[48] Courtis' view of retrogression also implies a close correlation between non-retrogression and the obligation to respect. He defines retrogression as 'any measure adopted by the state that *suppresses, restricts or limits* the content of [existing entitlements]'.[49] Yet, as O'Connell, Nolan, Harvey, Dutschke and Rooney carefully illustrate with examples, while a violation of the obligation to respect *may* also be accompanied by a violation of the non-retrogression obligation, this need not necessarily be the case.[50]

On close examination a slight difference between the two can be discerned. As O'Connell *et al* reason, the focus of the respect obligation on non-interference alongside retrogression's focus on maintaining the existing level of enjoyment, results in scenarios where the two have different applications.[51] There are two (exceptional) ways in which one of the obligations might be applied without the other. The first of these relates to retrogression while respecting, the other to violations of the obligation to respect while not retrogressing.

On a relatively strict reading, it can be said that the respect obligation will be engaged where there is *any* State interference with existing enjoyment (including the *nature and level* of that enjoyment).[52] On the other hand, retrogression would be engaged where there is a change in the level of enjoyment, but probably not where there is a change in the way that that level of enjoyment is attained (i.e. non-retrogression is less concerned by changes in the mode of enjoyment). This might have relevance in the case of

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[47] ibid para 48. It should additionally be noted that the CESCR sub-divides the fulfil obligation into obligations to 'facilitate, promote and provide'; ibid para 51.

[48] CESCR, 'Report on the Forty-Eighth and Forty-Ninth Sessions' UN Doc E/2013/22 para 12; CESCR, 'Report on the Eighteenth and Nineteenth Sessions' UN Doc E/1999/22 Day of General Discussion, para 507.

[49] Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 2(4) Erasmus Law Review 379, 393.

[50] O'Connell and others (n 1) 91–92.

[51] ibid.

[52] Koch describes this as a duty 'to uphold the status quo' Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5(1) Human Rights Law Review 81, 88–89.

increasing food bank use in developed countries, for instance. The obligation to respect existing fulfilment of the right to food would clearly be violated were State policies shown to have interfered with individual's existing ways of enjoying their right. However, if an equivalent level of enjoyment could be realised in a different way (for example) through charitable food banks then the obligation of non-retrogression might not be engaged. In this example, however, there is an important caveat; to avoid a prima facie violation of retrogression the level of enjoyment would have to be truly equivalent. This means, for example, that the reduced accessibility or acceptability which might come with this different mode of food provision could readily constitute retrogression. However, the basic example demonstrates how a State might not be respecting the right to food, while avoiding retrogression.[53]

The other way in which one of the obligations can be engaged without the other is where respect and retrogression co-exist. For O'Connell *et al*, this seems to be the more likely and more significant differentiation between the obligations:

> the difference between the obligation to respect and the obligation not to take retrogressive measures essentially relates to the situation where a step backwards by the state (retrogression) does not interfere with the existing enjoyment of the right (the obligation to respect).[54]

The reason for this view is clear and well expressed in the authors' example. Respect-plus-retrogression can occur where there is 'a promise of funding that is subsequently withdrawn'.[55] Such occurrences are frequent and mean that the distinction between the obligation to 'respect' and of non-retrogression is more than a purely theoretical one.[56] This variety of coexistence of respect and retrogression occurs where the retrogression does not affect the existing enjoyment of a right (the litmus test for the respect obligation). One of the only ways in which this can occur is where the sort of promised

[53] O'Connell *et al* provide the example of 'the state adopting a "city beautification" policy and ordering the eviction of occupants of areas and buildings targeted for redevelopment' where the state additionally 'fails to provide adequate alternative housing'. The authors – correctly – suggest that this scenario would entail both retrogression and a lack of 'respect'. If the example were to be modified so that adequate alternative house *was* indeed provided, then this could be an example of a lack of respect without a retrogressive measure. This is because existing enjoyment would be affected (the evictions), without the level of enjoyment being affected (there being adequate alternative accommodation). O'Connell and others (n 1) 92.

[54] ibid.

[55] ibid.

[56] See, eg, QUB Budget Analysis Project, 'Budgeting for Economic and Social Rights: A Human Rights Framework' (2010) 24 <http://ssrn.com/abstract=1695955> accessed 20 September 2016; Center for Economic and Social Rights (CESR), 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (2012) 19 <http://www.cesr.org/downloads/cesr.ireland.briefing.12.02.2012.pdf> accessed 20 September 2016; 'Trudeau's Empty Budget Promises on the Nation-to-Nation Relationship' <http://policyoptions.irpp.org/2016/03/23/trudeaus-empty-budget-promises-on-the-nation-to-nation-relationship/> accessed 20 September 2016; Subodh Varma and others, 'Budget 2016: New Budget Here, but Old One's Funds Still Unspent' (*The Economic Times*) <http://economictimes.indiatimes.com/news/economy/finance/budget-2016-new-budget-here-but-old-ones-funds-still-unspent/articleshow/51184928.cms> accessed 20 September 2016.

progression described by O'Connell *et al*, is later left undelivered.[57]

The central difference between the respect obligation and obligation of non-retrogression is therefore the focus on *existing* enjoyment in respect of the former and on *the level* of enjoyment in the latter.

Therefore, when one moves beyond the respect part of the typology to consider the interaction between retrogression and the protect obligation, much the same results can be seen. The obligation to protect – in the CESCR's words – 'requires States parties to take steps to prevent third parties from interfering'.[58] This requires the State to achieve the same result as in the case of the respect obligation (i.e. maintenance of the *status quo*), but must protect that result from interfering corporations *etcetera* rather than from itself. As is well known, the reason the respect/protect difference is of analytical utility is because of its demonstration of the different types of State action required.[59] So while the respect obligation will mostly require the State to refrain from acting, the protect obligation will require a degree of State action in order to prevent others from acting.[60] However, so far as the obligation of non-retrogression is concerned, this distinction is unimportant. As long as it is accepted that the duty of non-retrogression can require both State inaction and action (including State actions to deal with third parties),[61] there will be identical relationships as between respect-retrogression and protect-retrogression.

Several examples can help solidify this point. As with before, the right to food can be usefully employed. In the scenario where an individual's level of enjoyment of her right to food is disrupted by the extreme and unscrupulous raising of prices by a supermarket while the State fails to act, the obligation to protect will be violated. This is simply because the State has failed to take steps to prevent third parties from interfering with the right.[62] However, as long as an equivalent or better level of enjoyment of the right is enjoyed there will be no violation of the non-retrogression obligation. Practically, this

[57] O'Connell and others (n 1) 92.

[58] CESCR, *General Comment 21* (n 46) para 48.

[59] Koch (n 52) 82.

[60] Although this is not a neat divide as the CESCR has included as range of more positive duties within the respect category; ibid 88–89.

[61] The CESCR sometimes seems to leave open this possibility and O'Connell *et al* do appear to see inactions as capable of leading to retrogression, but Sepúlveda does not appear to see inaction as falling within retrogression; CESCR, *Concluding Observations: Germany* (UN Doc E/C12/DEU/CO/5 2011) para 20; O'Connell and others (n 1) 156, 70 (where they note respectively that housing related reductions in rights enjoyment 'can constitute retrogressive measures if caused by deliberate action or inaction of the state' and that 'an absence of adequate compensatory measures' can form part of retrogression); see also, above section 4.2.1.2.;; Sepúlveda (n 6) 319, 323–324.

[62] CESCR, *General Comment 21* (n 46) para 48; cf the suggestion that the 'protect' obligation is somewhat larger than this Koch (n 52) 91.

might involve a comprehensive, well-designed and quality programme of State support in order to fill the gap left by the supermarket's abuse.

Again mirroring the situation in relation to respect, it is possible for protection and retrogression to diverge. For example, the protect obligation would not be engaged by a broken State promise to better regulate tax abuses or poor working conditions perpetuated by third parties, but such a situation could well engage the prohibition on retrogression.

The relationship between retrogression, as traditionally viewed, and the fulfil obligation is looser than for the other parts of the typology. Fulfil requires that 'States parties to take appropriate … measures aimed at the full realization of the right[s]'.[63] It therefore links most clearly to the duty of progressive improvement and less clearly with the current view of retrogression as governing backwards slippage. Of course, there is some synergy between the two in cases of reduced ESR enjoyment. Where ESR enjoyment is reduced it would engage retrogression, and almost by definition involve the State failing to fulfil the rights (although this failure might be justifiable by reference to the progressivity of this duty). However, there is no overlap in the opposite case; it does not follow that a failure to fulfil will mean retrogression has occurred.

The other difference of relevance here is the progressive nature of the fulfil obligation.[64] Whereas all of the respect, protect, and non-retrogression obligations are largely (or wholly) obligations of immediate effect, fulfil operates differently. This distinction would make it difficult to have a depth of overlap between the obligations of non-retrogression and fulfil even into the future.

The various relationships between retrogression and other key ICESCR ideas that have been discussed here is not static. It is important that, no matter what form(s) the doctrine of non-retrogression takes in the future, it is compared, contrasted, linked and differentiated from the (also developing) pictures of central tenets of the Covenant.

4.3. Replacing Retrogression?

The sometimes uncomfortable positioning of retrogression within the cannons of the ICESCR, adds further difficulty to defining its proper location within the Covenant system.

[63] CESCR, *General Comment 21* (n 46) para 48.

[64] O'Connell and others (n 1) 108.

With so many challenges with the doctrine's direction, why should further effort and resource be expended on its rescue?

One answer to this question treats the doctrine's defining weakness as a strength. The disarray of retrogression can be turned into a constructive tool that can address other difficulties within the Covenant. It is well known that the ICESCR and its companion treaties are not flawless documents; enforcement, responsiveness, accountability of non-state actors, and extraterritoriality are just some of the more prominent issues. In this context, it is the very malleability of retrogression that means that it can be shaped into solutions to both the procedural and substantive lacunae in the ICESCR.

Yet, malleable as retrogression might be, other doctrine innovations might be even more flexible – and perhaps more effective – in remedying the ICESCR's difficulties. Why then, is the continued existence, in particular, of a doctrine of non-retrogression required? A new doctrine or an adaption of an existing ESR concept might equally be used in remedying the ICESCR's issues and could avoid the identified failings with the non-retrogression doctrine.

However, there are also justifications that speak specifically to the continuation of the non-retrogression doctrine. Just as there have been substantial difficulties identified with retrogression, these difficulties are neither fatal nor unique to the doctrine of non-retrogression. The lack of a certain legal basis is a trend across many doctrines, devices and mechanisms used in international human rights law.[65] Questions around the effectiveness of the doctrine can also be asked of other areas of the international human rights regime.[66] Likewise, the changeability of retrogression is mirrored in other doctrinal developments (such as the respect, protect, fulfil framework).[67] While such difficulties with legality, changeability and effectiveness are present with several human rights devices, these critiques are perhaps more pronounced in relation to the doctrine of non-retrogression

In any case, these difficulties are not fatal (individually or in combination) to the continued existence of the doctrine. There is no threshold (however useful it might be) for the discarding of mechanisms of international human rights that have amassed so many

[65] See for example, the minimum core doctrine of the CESCR or the Human Rights Committee's stance on treaty reservations, both of which have disputed legal bases in their respective parent treaties; CESCR, *General Comment 3* (n 22) para 10; Human Rights Committee, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41* (UN Doc CCPR/C/21/Rev1/Add6 1994).

[66] See broadly, Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935.

[67] Sepúlveda (n 6) 157ff.

difficulties as to raise questions about their continued existence. There is no formal 'repeal' of such problem-laden doctrines; at best they are edged into quiet retirement.[68]

There are, however, significant advantages to the continuation of some concept of non-retrogression rather than beginning afresh with a new concept. First, and practically speaking, there is no indication that the CESCR intends to abolish the doctrine of non-retrogression. Nor is there an indication that the Committee is willing to 'start' a new doctrine that addresses the issues where retrogression was ineffective. It seems pragmatic, therefore, to explore the possibilities of an effective doctrine that can supplement the ICESCR's defects, and which works within the existing shell of non-retrogression.

In addition, the doctrine of non-retrogression has accumulated 'brand recognition' as an ICESCR obligation. Despite the confusion about the exact meaning of the term, its existence is recognised in UN documents,[69] textbooks,[70] and advocacy communities.[71] Indeed, despite the confused history of non-retrogression, there is longevity and resilience to the doctrine as evidenced by its history of over twenty-five years. Implicit in this continued recognition is also a degree of acceptance. Replacing the doctrine would involve setting this recognition and acceptance aside and beginning a new history.

The damage done by the abandonment of the retrogression 'brand' would extend to the recognition of the term beyond the CESCR and its associated communities. The doctrine of non-retrogression has filtered into the work of the CommRC[72] and the work of various Special Rapporteurs.[73] There is inertia that precedes such infiltration, with a period of time

[68] Eg, the conduct/result typology; ibid 184.

[69] For a selection see Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Mission to the Syrian Arab Republic* (UN Doc A/HRC/17/25/Add3 2011) para 14; Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights, *Reports on Three Multi-Stake Holder Consultations on the Draft General Guidelines on Foreign Debt and Human Rights Held in 2010* (UN Doc A/HRC/17/37 2011) para 89; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *Mission to Indonesia* (UN Doc A/HRC/25/54 2013) para 8; Special Rapporteur on the Right to Food, *The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food : Moving from Charity to Obligation* (UN Doc A/HRC/10/5 2009) para 41; Special Rapporteur on contemporary forms of slavery, including its causes and consequences, *Summary of Activities* (UN Doc A/HRC/27/53 2014) para 23; Special Rapporteur on the human right to safe drinking water and sanitation, *Common Violations of the Human Rights to Water and Sanitation* (UN Doc A/HRC/27/55 2014) para 46; Special Rapporteur on extreme poverty and human rights, *Fiscal Policy and Taxation Policies* (UN Doc A/HRC/26/28 2014) para 28.

[70] Fons Coomans, 'Education and Work' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP Oxford 2013) 246; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2014) 531; Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2012) 323, 325.

[71] Particularly by Center for Economic and Social Rights (CESR), 'Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown' (n 56); Center for Economic and Social Rights (CESR), 'Spain: Visualizing Rights' (2012) <http://www.cesr.org/downloads/FACTSHEET_Spain_2015_web.pdf> accessed 20 September 2016; Center for Economic and Social Rights (CESR), *Egypt: Factsheet* (2013) <http://cesr.org/downloads/Egypt.Factsheet.web.pdf> accessed 20 September 2016.

[72] See, eg, CommRC, *General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)* (UN Doc CRC/C/GC/15 2013) para 72.

[73] See, eg, Special Rapporteur on extreme poverty and human rights (n 69) para 28.

passing before such individuals and bodies recognise and adopt the concept into their work. This would be likely to apply to any alteration to the doctrine of non-retrogression, but might be especially pronounced where new concepts or terms are introduced.

The doctrine of non-retrogression, then, despite its lack of purpose and serious substantive inconsistencies should be retained for its potential and symbolism. The doctrine holds potential in addressing some of the ICESCR's imperfections, and its name-recognition and integration into the work of various UN actors and advocacy communities demands that, at least, the terminology of non-retrogression be retained.

4.4. A Progressive Realisation-Related Purpose

If, then, retrogression is to be retained, how should it be reformed? Clearly, the reasons that the doctrine of non-retrogression is in need of a clearly defined purpose are not divorced from the type of purpose that is needed. As such the proposed purpose must respond to the challenges posed by the doctrine's disarray, the weak legal basis of some versions of the doctrine, and the under-employment of the doctrine (especially in certain contexts).

On this basis, it is suggested that the purpose of the doctrine of non-retrogression should be to further the article 2(1) obligation of progressive realisation. The reasons for orientating towards such a purpose can be divided into 'foundational' comprising reasons of symbolism, legality and history, and 'operational', comprising arguments surrounding the functioning of progressive realisation. An important function of this set of rationales is to provide a (re)constructed doctrine of non-retrogression with a firm normative basis. Through developing a progressive realisation-related purpose for the doctrine rather than its own independent grounding, it is given a weightier basis. By the same token, however, the reasons below make a case for attaching the doctrine not solely to the legal understanding of progressive realisation, but basing it in a broader range of factors. It is this more diverse range of operational rationales that allow a broad (re)construction of the doctrine which can address structural threats, micro actors' concerns, crises, and its practical difficulties.

4.4.1. Foundational rationales

Many of the doctrine's iterations have had a clear link to progressive realisation. Despite having their own weaknesses and having different forms to the type of doctrine now

needed, the original enunciation of the doctrine,[74] and many that followed later,[75] contained the idea being returned to here; that retrogression can supplement and support article 2(1). Through a return to that traditional idea, reformulations of the doctrine can claim a lineage that adds to the rhetorical value of the doctrine.

There is clear symbolism in restating the centrality of the progressive realisation obligation by orientating a secondary obligation to face it squarely. Some have expressed caution at relying upon subsidiary obligations while ignoring the central progressive realisation obligation.[76] (Re)purposing the doctrine of non-retrogression to support article 2(1), both acknowledges the imperfections of that article's formulation and emphasises the potential for its effective use.

Another 'foundational' rationale for a progressive realisation-related purpose is linked to the legality of any doctrine. While it is possible to construct a legal basis for all of the various iterations of the doctrine discussed in the previous chapter, it is additionally clear that most straightforward route to providing a legal basis for the doctrine comes from the ICESCR's progressive realisation provision. In its first foray into the territory of non-retrogression, the CESCR tied the doctrine to progressive realisation.[77] As the progressive realisation obligation itself appears in the highly ratified ICESCR,[78] the obligation provides a strong legal foundation for retrogression. The purpose proposed for retrogression below emphasises a straightforward connection between retrogression and progressive realisation, and as such does not require legal support from other sources (such as general principles of human rights).

4.4.2. Operational rationales

There are, in addition, operational reasons for orientating retrogression towards supporting progressive realisation. These centre on the current practical difficulties encountered in the enforcement and conceptualisation of the progressive realisation obligation.

The CESCR has struggled in its attempts at applying progressive realisation in Concluding Observations. A pattern can be seen in its recommendations to States that indicates the

[74] See Chapter 3, pp80-85.

[75] See above Chapter 3, pp86-90.

[76] Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) Human Rights Law Review 349.

[77] CESCR, *General Comment 3* (n 22) para 9. Although see Chapter 3, pp80-85 for discussion of how the CESCR did not intend to create a separate obligation of retrogression.

[78] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) article 2(1). 164 ratifications as at 20th September 2016.

Committee's discomfort with its own interpretation of progressive realisation in General Comment 3. Only once[79] does the CESCR invoke the formulation of 'effective and expeditious' progressive realisation that it prescribed in that General Comment.[80] Elsewhere the CESCR is limited to invoking a distorted conception of the dynamic 'rate over time'[81] previously set down. Applications requiring countries to 'speed up progress',[82] progressively realise to a 'fuller extent', [83] or noting a 'lack of progress',[84] are distortions as they remove the optimising requirement of the Committee's interpretation of progressive realisation. Whereas the requirement of 'effective and expeditious' realisation draws a clear conceptual line against which States are to be measured, the CESCR's persuasions to 'speed up' are less exacting and provide no such conceptual clarity. However, despite the conceptual clarity of the 'effective and expeditious' formulation, practically determining the level of State activity that satisfies this requirement is highly demanding. It is this practical problem that has likely caused the CESCR to warp its own test.

Far more common than either correct or distorted uses of progressive realisation in the Concluding Observations, however, is an avoidance of its use altogether. In the vast majority of Concluding Observations there is no attempt to apply the obligation. On the occasions where the Committee gives a reason for its non-application of the obligation, the reason is almost uniformly a lack of data. Repeatedly, the Concluding Observations note the need for 'effective mechanisms for monitoring',[85] an 'absence of statistics',[86] or similar difficulties in evaluating progressive realisation.[87] These practical difficulties experienced by the CESCR are reflected in the literature on the subject. Elements of the scholarship note that the obligation is 'extremely complicated' and requires an 'enormous quantity of good

[79] CESCR, *Concluding Observations: Japan* (UN Doc E/C12/JPN/CO/3 2013) para 7.

[80] CESCR, *General Comment 3* (n 22) para 11.

[81] Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights' (2009) 1(3) Journal of Human Rights Practice 402, 414.

[82] CESCR, *Concluding Observations: Japan* (UN Doc E/C12/1/Add67 2001) para 52.

[83] CESCR, *Concluding Observations: Germany* (UN Doc E/C12/1/Add29 1998) para 7.

[84] CESCR, *Concluding Observations: Benin* (UN Doc E/C12/1/Add78 2002) para 13.

[85] CESCR, *Concluding Observations: Democratic People's Republic of Korea* (UN Doc E/C12/1/Add95 2003) para 23.

[86] CESCR, *Concluding Observations: Bolivia* (UN Doc E/C12/BOL/CO/2 2008) para 13.

[87] CESCR, *Concluding Observations: Sudan* (UN Doc E/C12/1/Add48 2000) para 21; CESCR, *Concluding Observations: Angola* (UN Doc E/C12/AGO/CO/3 2008) para 20; CESCR, *Concluding Observations: Kuwait* (UN Doc E/C12/KWT/CO/2 2013) para 4; CESCR, *Concluding Observations: Uzbekistan* (UN Doc E/C12/UZB/CO/1 2006) paras 12, 48.

quality data',[88] or simply that there is not enough data,[89] and that progressive realisation issues are usually linked to structural issues.[90]

Given that progressive realisation is so laden with practical issues, a reorientation of retrogression towards resolving some of these core problems is required. There are both basic conceptual commonalities and practical synergies between the two obligations that might be exploited to improve the effectiveness of both.

4.5. Reconstructed Retrogression

The challenge, then, in reconstructing retrogression in order to pursue the purpose of supporting the progressive realisation obligation, is to strike a balance between internal coherence and innovation. While it is clearly important for retrogression to fit within the ICESCR and to have a close connection to article 2(1), a simple duplication of that article will do little to further its aims and would lead to retrogression's redundancy. As such, it is crucial that the (re)constructed doctrine addresses distinctive but complementary concerns, to progressive realisation.

Consequently, the proposed (re)construction of the doctrine sees:

> a retrogressive measure defined as an action, inaction or contribution to a trend which is likely to negatively affect the progressive realisation of individuals' ICESCR rights.

Given the critical nature of the discussion above on the CESCR's deviation from a clear legal basis for the doctrine of non-retrogression, it is necessary to demonstrate from the start, a basis for the proposed (re)construction. As will be obvious from the wording used, the primary basis in law is the article 2(1) obligation of progressive realisation. The (re)constructed phrasing explicitly references this obligation and deliberately orientates retrogression towards its pursuit. Additionally, the ICESCR's long-term obligation upon States to work towards the 'full realization' of the rights,[91] provides a basis for the 'long-view' of progressive realisation that the (re)construction takes (discussed further below) with its additional and more strategic approach. The broad supervisory and implementation

[88] Cees Flinterman, 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1997) 15 Netherlands Quarterly of Human Rights 244, 244.

[89] Edward Anderson and Marta Foresti, 'Assessing Compliance: The Challenges for Economic and Social Rights' (2009) 1(3) Journal of Human Rights Practice 469, 470.

[90] Felner (n 81) 407.

[91] *International Covenant on Economic, Social and Cultural Rights* (n 78) art 2(1).

competences set out in articles 18-23 of the Covenant mandate the CESCR's role in monitoring such a provision on retrogression.[92]

The following chapters of the thesis address in depth the ways in which this (re)construction might be better positioned to engage with structural concerns and the particular impacts that crises can have. It also tests the extent to which the (re)constructed doctrine might be more responsive to micro-level concerns and how it might be more effectively implemented than current versions. This chapter, however, is dedicated to giving an overview and sketching the primary features of this (re)constructed doctrine. It is principally a 'commentary' on the wording of the (re)constructed definition. However, the larger implications that flow from several of the phrases in the (re)constructed doctrine are more fully explored in later chapters, and only signposts are provided here.

4.5.1. Introduction and reconstructed character

The (re)construction is radically different to the CESCR's developed doctrine in both its textual alterations and in its novel character. It has greater dynamism, with a less mathematical formulation and a greater range of potential applications. The CESCR's retrogression was limited to applications in certain materialised conditions of rights enjoyment,[93] and there was equally limited discretion in its application.[94] The (re)constructed retrogression gives scope for a longer term and more dynamic view of situations, and greater flexibility in when to apply it. As a consequence, a finding of retrogression would take on an altered significance. While the language suggested above – in particular the tie to progressive realisation – maintains (and strengthens) the legal character of the doctrine, it minimises the *legalistic* element of retrogression. In other words, while the (re)constructed retrogression has a clear legal basis in the progressive realisation obligation, it can be applied without reference to extensive and legalistic conditions and tests, a difficulty that affected conditions which demanded multiple layers of proof and strong presumptions.[95] The implications of this shift in character are further explored below, however it is first worth pausing to consider how a change in character can benefit retrogression.

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[92] ibid arts 18-23.

[93] The CESCR's doctrine of non-retrogression addressing 'measures taken', rather than adopting a more predictive/pre-emptive mode and addressing measures 'under consideration' or measures that 'will be taken'. See, eg, CESCR, *General Comment 19* (n 2) para 42.

[94] Especially in the latter versions of the doctrine in which an increasing number of conditions are set down to determine the existence of impermissible retrogression; ibid; CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 paras 9-10.

[95] See, for example, CESCR, *General Comment 13* (n 22) para 45; CESCR, *General Comment 14* (n 22) para 32; CESCR, *General Comment 15* (n 45) para 19. See also Figures 8 and 9 in chapter 8, pp215-216.

It has been highlighted in the past that the CESCR is reticent to invoke the language of 'violations' in many contexts,[96] and this reticence also applies to the Committee's uses of retrogression. Very rarely[97] has the CESCR declared a State to have violated the duty of non-retrogression. The CESCR's commitment to a 'constructive dialogue'[98] with States arguably necessitates such a cautious approach to binary terms such as violation/no violation, legal/illegal, or permissible/impermissible in applied contexts. However this linguistic caution can additionally weaken one of the primary mechanisms of ESR enforcement – the ability to 'shame' States[99] – and can leave the Committee's Concluding Observations on severe situations looking inadequate, especially to observers not versed in the diplomatic language of UN bodies.[100]

On the other hand, hegemonic phenomena that threaten the fulfilment of ESR rarely invoke hesitant or qualified language. Take, for example, the unambiguous rallying call of neoliberalism; 'There Is No Alternative'. The hegemony's brute use of language to force the adoption of certain meanings also stands in contrast to the more measured approach of human rights discourse. This sets a trap for those using 'forms and languages of protest or resistance' to contest established power as they are forced to use the terms of the prevailing hegemony[101] or risk talking with an 'internal' language, understood within the community of opposition, but with little traction beyond it.[102] Consequently, hegemonies are places where there is a deep 'struggle at the level of social language' and where meaning comes to be determined.[103] For the ICESCR system to define the meaning of a given situation, requires its language to have an adaptability able to meet the hegemony's capacity to keep 'its balance … by shifting continually to meet its various challengers'.[104]

Linguistic moves will – and should – always give way to the formal legal responses of the CESCR. However, there is currently a significant gap between the small number of

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[96] Audrey R Chapman, 'A "violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) Human Rights Quarterly 23.

[97] The exceptions being (respectively) an historical finding of retrogression and a finding of measures with a 'retrogressive nature'. CESCR, *Concluding Observations: Canada* (UN Doc E/C12/CAN/CO/4; E/C12/CAN/CO/5 2006) para 52; CESCR, *Concluding Observations: New Zealand* (UN Doc E/C12/NZL/CO/3 2012) para 17.

[98] For a discussion of approaches to Concluding Observations see; Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6(1) Human Rights Law Review 27, especially 36.

[99] Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26(1) Human Rights Quarterly 63, 67.

[100] For example the CESCR's response to Spain's austerity measures; CESCR, *Concluding Observations: Spain* (UN Doc E/C12/ESP/CO/5 2012).

[101] William C Roseberry, 'Hegemony and the Languages of Contention' in GM Joseph and Daniel Nugent (eds), *Everyday forms of state formation: revolution and the negotiation of rule in modern Mexico* (Duke University Press 1994) 363–4.

[102] ibid 361.

[103] Vincent B Leitch, *The Norton Anthology of Theory and Criticism* (1st edn, W W Norton & Co 2001) 2447.

[104] ibid.

situations where the CESCR is prepared to clearly declare a violation of the Covenant, and the small number of situations where there is clearly no violation. In other words, beyond the two extreme situations in which there is an adequate normative and evidential basis to declare a violation or no violation, there is a large area of linguistic 'grey'. The hard legal standards do not leave such a grey area as they are usually constructed in binary terms with no space in between. Thus, for example, the ICESCR repeatedly requires that rights are 'exercised without discrimination of any kind'.[105] However, linguistically and practically there is a grey middle ground where evidence is difficult to obtain or where adequate data is not available.

It is in this 'grey' space where the CESCR is currently unwilling (in the pursuit of 'constructive dialogue') or unable (due to a lack of evidence or legal clarity), to make a clear finding either way, that there is the greatest capacity for an increased Committee role. While the Committee seems to be (subconsciously) aware of this space and its role within it, its current approach is limited and linear. The Committee has issued heavily qualified responses and warnings to States, and as such has barely attempted to shape the social meanings attached to its observations and recommendations. Although the institutional aspects of the CESCR are an important part of such engagements, the legal framework could also better accommodate attempts to provide language capable of adaptability and engagement with social language and meaning.[106]

The (re)construction of retrogression develops a new character of dynamism, a strong legal basis without excessive legalism, and endows retrogression with importance as a linguistic signifier. These characteristics are important constants that have capacity to inform the interpretation of individual clauses. However, there is significance in the formulation of each phrase within the (re)constructed definition. These are explored in groups below according to the aspect primarily affected, however it is clear that the implications of a particular word or phrase can cut across the categories used here.

4.5.2. Structural elements

The phrase 'contribution to a trend' in the (re)constructed doctrine entails significant innovation on the existing rights frameworks. The term is not found in any of the main international human rights treaties. Neither has the word 'trend' been used frequently in the General Comments of the treaty monitoring bodies. As such it has not acquired a

[105] *International Covenant on Economic, Social and Cultural Rights* (n 78) art 2(2).

[106] An important reason for addressing such social meaning is the capacity for grassroots engagement discussed in Chapter 7.

specific or defined meaning.[107] The phrase allows for a broader range of State actions to be captured within the purview of retrogression. However, the phrase is also intended to indicate a concern with 'trends' that are broader than an individual State('s) action. The use of the notion of a 'trend' and its possible implications for retrogression are discussed at greater length in the following chapter. However, for now it suffices to note that a focus on 'trends' might allow the CESCR to engage in greater depth with large-scale issues of significance such as environmental damage, growing income inequality, the growth of extremism, technological developments, or fiscal austerity.

The (re)constructed phrasing loosens the connection between State action and the (alleged) harm. This has three significant results. The first is a diversification of the actors that the doctrine of non-retrogression might have cognisance of. That is to say that, any need that existed under the old doctrines to demonstrate the State's sole or primary responsibility for a phenomenon is extinguished.[108] With the requirement of showing only 'a contribution', the actions of States can be examined even in the context of a complex mesh of public/private sector influence[109] and where multilateral State action is a factor.[110]

Conversely, under this approach there would be no State responsibility for actions of non-state actors where there was no State contribution to the action or trend. In practice, such instances will be vanishingly rare as harms to ESR will usually be linked to the State's failure to regulate or intervene in respect of such actors.[111] An example where a State may evade responsibility for the harms perpetrated by non-state actors, might be where the State has a comprehensive and effective system of regulation which is positively enforced, but which a non-state actor nonetheless violates. However, it is not likely that the ICESCR currently

[107] The closest analogous use of the term was by the CommRC to refer 'to the ongoing trends of decentralization, and outsourcing and privatizing of State functions'; CommRC, *General Comment 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights* (UN Doc CRC/C/GC/16 2003) para 1.

[108] There is an indication of the CESCR's tendency to think in terms of attributing retrogression to a single State in its General Comments. The wording reproduced through many of them refers to the non-retrogression obligations of 'the State Party'. The exception to this form of words is where the Committee refers instead to the obligations of 'States parties' in Comments 3 and 18. While the former indicates obligations divided along traditional State lines, the latter leaves open the possibility of 'joint and severable' ESR obligations amongst States parties. It should be noted, however, that the language of 'States parties' is also capable of referring simply to divided obligations that belong to multiple States. CESCR, *General Comment 3* (n 22) para 9; CESCR, *General Comment 18* (n 45) para 21.

[109] An area of growing interest to ESR scholars and human rights scholars more generally; Koen De Feyter and Felipe Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Intersentia 2005).

[110] As in, eg, human rights un-friendly schemes of taxation; Special Rapporteur on extreme poverty and human rights (n 69) para 78.

[111] The legal mapping of this tends to be less stringent. The threshold for finding a State has discharged its positive obligations varies but some of the tests include 'reasonableness', 'all feasible precautions', and 'due diligence'; Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11(2) Human Rights Law Review 275; Ergi v Turkey App No 40/1993/435/514 (ECtHR, 28 July 1998) para 78; Special Rapporteur on violence against women, its causes and consequences, *State Responsibility for Eliminating Violence against Women* (UN Doc A/HRC/23/49 2013) paras 39-40.

covers such scenarios.[112] And, although comprehensive non-State actor accountability is not secured, the finding of (partial) responsibility of a single State becomes more achievable.

While the first shift of this terminology is an accommodation of a diversity of actors, the second shift of significance is an embracing of a focus on more diverse State actions. The CESCR's retrogression precipitates a focus on State 'measures'.[113] Furthermore, such measures, according to the Committee, must be 'taken', 'introduced' or 'adopted' by the State, or more explicitly be a 'course of action'.[114] Examples of measures provided by the CESCR have also tended to emphasise 'active' steps by the State. So for example, in relation to social security the Committee suggest that 'measures' encompasses the 'repeal or suspension of legislation', 'active support' for harmful measures, 'the establishment' of differentiated eligibility based on residency, 'active denial of … rights'.[115] While such a focus on the 'active' choices of the State is justifiable based on the additional framing of retrogressive measures as a 'deliberate', it is also a limiting factor on the effectiveness of the doctrine.

Such a focus only on the active measures taken by a State fails to acknowledge the range of harms that can result from State inactions. It can, as Dowell-Jones has highlighted, in fact act as a disincentive to those States which have been proactive in their approach to ESR by drawing attention to measures that have been started and then stopped or reduced, while paying less attention to States that never began a programme of 'active' measures.[116] By focussing on inactions too in the formulation of the (re)constructed doctrine, it removes the bias towards the actions of States.

In particular, it removes a difficulty of proof that exists under the CESCR's doctrine that affects its ability to contribute to structural (or 'macro') debates. It is clear that in the majority of truly structural phenomena, such as climate change, the State will not have enacted a specific 'measure' to cause, or allow the causation of, ESR infringements. Yet, at the same time, there may be many policies with smaller effects that in aggregate contribute

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[112] John H Knox, 'Horizontal Human Rights Law' [2008] American Journal of International Law 1, 22–23 (noting that the usual duty upon States vis-a-vis third parties is one of due diligence); CESCR, *General Comment 16* (n 2) para 28 (where the CESCR requires that States 'act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against [men and women] by private actors'); Andrew Clapham and Mariano Garcia Rubio, 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' [2002] Health and Human Rights Working Paper Series 12, fn26 <http://www.who.int/entity/hhr/Series_3%20Non-State_Actors_Clapham_Rubio.pdf?ua=1> accessed 20 September 2016. Were the Covenant to cover such instances, the State would be implicated in cases of full horizontal application of the ICESCR between individuals.

[113] CESCR, *General Comment 19* (n 2) para 42.

[114] CESCR, *General Comment 18* (n 45) 21; CESCR, *General Comment 15* (n 45) para 32; CESCR, 'MAR under OP' (n 94) 9.

[115] CESCR, *General Comment 19* (n 2) para 64.

[116] Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff Publishers 2004) 52.

to the phenomena, or a range of inactions that the State might be held accountable for. This is a complexity in the web of State activity that is not well captured by simple action/ inaction binaries. Through focussing on a 'contribution to a trend' the (re)constructed doctrine opens up a space for State accountability for a broader range of measures, actions, and inactions.

Third, is that while the CESCR's retrogression required a clear causal link between State action and a negative rights-impact, the new phrasing loosens this connection. In many cases, where there are multiple influencing factors and a crowded policy environment, it will be (and has been[117]) difficult to prove that a specific State policy action resulted in (is causally linked to) a specific negative outcome for an individual.[118] Through seeking only a 'contribution' to the negative outcome, the (re)constructed version of the doctrine requires a more realistic level of proof.[119] While the (re)constructed doctrine's loosening of the requirement for causality between State action and human rights impact might seem radical, it is worth noting that analogous duties are already imposed on States. This is most especially true of the obligation to 'protect' which holds States accountable for not preventing the harms of third parties (an indirect causal relationship at best).[120]

There is, as noted in previous sections,[121] a significant challenge in (re)constructing a version of retrogression that supports and furthers the progressive realisation obligation while also remaining within the constraints of the ICESCR system. The suggested text of the (re)constructed doctrine seeks to achieve this through adopting a novel way of achieving the obligation, while leaving the obligation itself untouched. An explicit link to progressive realisation roots retrogression in the (evolving) substance of progressive realisation, while adopting a markedly different approach to the pursuit of progressivity.

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[117] Examples abound, such as an increase in food poverty (caused, for instance, by State cuts to social security, State policy on food provision, anti-competitive supermarket practices, the economic crisis, or a harsh winter), exploitative clothing manufacture (caused, for instance, by the State weakening regulations, rogue companies, or desperate economic conditions), and worsening health outcomes (caused for instance, by reduced State expenditure on health, privatisation of health services, increased pollution, or more demanding labour). The point here is that it is not impossible to show which phenomena were contributory causes, but that it is exceedingly difficult to demonstrate that *the cause* of a negative result was State actions.

[118] Such an indication of the need to demonstrate 'cause and effect' can be seen in repeated reminders of the State's 'burden' of showing that *prima facie* retrogression is justified. Such a reverse burden of proof is entirely appropriate given the State's greater capacity, however it emphasises the need for a retrogressive measure to be demonstrated in the first instance. See, eg, CESCR, *General Comment 13* (n 22) para 45. See further Table 3, Chapter 8, p217.

[119] In doing so it addresses one of the key problems highlighted by Sepúlveda when she argues that harms must be 'directly attributable' to the State. See above pp104-106.

[120] See generally on the respect, protect, fulfil typology; Sepúlveda (n 6) 157. See also above pp108-112.

[121] Above pp118ff.

At its core, the progressive realisation obligation focusses on whether States have improved levels of rights enjoyment and the rate at which that improvement occurs.[122] This is, although not commonly framed as such, a mathematical assessment of progress, albeit one that is significantly complicated by qualitative factors.[123] Stripping qualitative factors away, an assessment of performance on the obligation entails looking at the level of protection of a right in year X, and assessing whether there has been an improvement in protection in year Y. So, for example, if 94% of a State's population fully enjoyed their right to food in 2003, the question is whether that percentage increased or decreased in 2008? Coming to such a determination engages fraught debates on the utility and accuracy of indicators and statistics in human rights.[124]

This function of monitoring compliance over time, although again being infrequently acknowledged, is an unusual function for a legal doctrine. Bluntly, the usual method of assessing legal compliance is to look at actions or results in a specific and narrow timeframe. Such a 'snapshot' assessment is inadequate for the progressive realisation obligation, as it relies on having a comparator against which to assess progress. It is this comparative element that poses difficulties, with poor and changeable data preventing the CESCR from making like-for-like comparisons.

Even if one moves beyond such difficulties, this is not the whole story as qualitative factors must be integrated. Consideration should be given to whether those deprived of their right are from a particular minority,[125] whether the pace of improvement might have been better,[126] the prevailing (economic, political, security, social) conditions in the country during the period,[127] whether the improvement had come at the cost of another right, *etcetera*. This glance at the layers of difficulty in assessing progress shows how mathematical assessments are implicated in the logic of the obligation, and how such mathematics can be at best complex, and at worst problematic.

In addition, the progressive realisation obligation says little about *how* such improvements are achieved. This is classically defended as a position that appropriately respects the State's

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[122] This dynamic caused unease during the discussions of what complaints mechanisms to include in the ICESCR, where it was said that, 'it would be impossible for the committee to determine what rate of progress in any particular case should be'; 'Annotation on the Text of the Draft International Covenants on Human Rights' (1955) UN Doc A/2929 Pt. II, at 124, para 41 .

[123] For examples see; Chapman (n 96) 33.

[124] For a good overview see; Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23(4) Human Rights Quarterly 1062, 1062.

[125] CESCR, 'MAR under OP' (n 94) paras 4, 8(f).

[126] ie whether the progressive realisation has been 'expeditious and effective'; CESCR, *General Comment 3* (n 22) 9.

[127] CESCR, 'MAR under OP' (n 94) paras 10(c), 10(d).

discretion on means (but not ends).[128] Yet, the distinction between means and ends is closely analogous to the collapsed dichotomy between conduct and result. It is difficult to see how (even in theory) a focus only on 'ends' or 'results' would be effective or even possible. In any case, it is not the approach that has been taken by the CESCR or UN Special Rapporteurs, which have necessarily moved to incorporate a greater focus on States' means of achieving rights.[129]

The (re)constructed version of retrogression aims to avoid these difficulties with progressive realisation, while remaining centred on the obligation. 'Progressive realisation' is expressly mentioned in the (re)construction and forms the centre and purpose of the (re)constructed doctrine. At the same time, the more problematic aspects of progressive realisation are avoided by the need only to show a negative effect upon progressive realisation (and not to definitively show a violation). Mathematical assessments, indicators, and a dominant focus on 'ends' are all eschewed by the proposed version of retrogression. This puts a degree of distance between the two obligations, by adopting distinct methods of assessing their fulfilment. Simplistically put, while progressive realisation demands a detailed and complex assessment of current ESR outcomes, the (re)constructed retrogression permits a necessarily more speculative assessment of the medium- and longer-term threats to the progressive realisation of ICESCR rights. This latitude for the Committee might allow it to be more ambitious within its limited resource and capacity.

4.5.3. Improving Resilience

While the current doctrine – without a stable content or purpose – has been open to somewhat capricious change, especially in a crisis situation, the (re)construction can bring greater resilience. The assigned purpose plays a key role in this respect. It provides a key point of reference for the application of the doctrine. In addition, in being orientated towards the most important and distinctive obligation in the ICESCR, the progressive realisation-related purpose is particularly stable.

This clear purpose should guide the application of the doctrine even in the most pressurised situations. Furthermore, the inclusion of 'trends' within the scope of the (re)constructed retrogression, brings an additional tool for the CESCR that might be especially useful in times of crisis. It allows them to act early on States' retrogressive measures which have yet

[128] Implicit in, eg, ibid paras 8(a), 8(d).

[129] Indeed, such a function seems implicit in the CESCR's mandate to offer technical assistance to States.

to result in reductions in rights enjoyment. This is especially important in crises due to the severe results for rights protections that can occur very quickly.

4.5.4.Micro elements

The phrase, 'likely to negatively affect', that is present in the (re)constructed doctrine captures a relatively broad range of situations. However, this is commensurate to the uncertainty that is contained in the (re)construction's aim of addressing future threats to progressive realisation. This is of practical utility as it allows retrogression to be employed even where uncertainty remains. As such, the use of 'likely' can be contrasted to higher bars of proof such as 'highly likely', 'certain to', or 'will lead to'. Similarly, the choice of 'negatively affect' progressive realisation, is clearly more moderate than the phrases 'cause damage' or 'seriously affect'.

In addition to the practical dimension of these moderate requirements of proof, there is an overlapping benefit in making retrogression more accessible to grassroots campaigns. This dynamic is explored in greater depth in chapter 7 below, however here it suffices to say that the large information asymmetry between State organs and individuals, NGOs and campaign groups requires sensitive handling by any (re)construction of retrogression. By adopting a requirement for proof that is flexible ('likely', 'negative'), advocacy organisations might better be able to challenge State policy in spite of their relative under-resourcing and lack of comprehensive information.

While important that the doctrine responds to high-level, structural policy debates, it is also the *raison d'etre* of the ICESCR to protect and further individuals' ESR. The phrase 'negatively affect the progressive realisation of *individuals'* ICESCR rights', inserts such a focus in the (re)constructed retrogression. This promotes a re-connection to the individual and her experience. As is extensively explored below, this allows a reflection of individual and grass-roots concerns in the usage of retrogression and acts as a check on any excessive abstraction of the concept. By taking its focus as the individual, this phrasing would also be likely to be of greater utility in Optional Protocol complaints.

4.5.5. Practical elements

It has been noted that the doctrine of non-retrogression as developed by the CESCR fails to provide a definition of what a retrogressive measure is, and instead outlines when the

obligation to avoid retrogression will be breached.[130] Such an approach arguably underlines the CESCR's own uncertainty surrounding the content of the doctrine.[131] The (re)construction of the doctrine avoids such definitional uncertainty from the beginning. There does remain in any such rewrite, uncertainty about how and to what situations the new doctrine might be applied, however, clarity in this regard is contributed through explication in subsequent chapters.

There is an additional advantage to a straightforward definition of a retrogressive measure. Whereas there was little indication of what constituted a 'retrogressive measure', the CESCR contributed significant detail on the criteria for finding a breach of the obligation. This caused attention to focus on the legal/technical aspect (is there a 'breach'?), rather than on the actual/substantive element (what is the 'retrogression' that we should be concerned about?). Put differently the predominance of attention was on the 'doctrine' rather than the 'retrogression' itself. While focus on the former rather than the latter is likely to bring less controversy, it, in effect, serves to divert focus and debate from the pronounced wrongdoing. In its structure and terms, the (re)constructed retrogression plainly gives prominence to the impugned action of the State.

As is explored in the following four chapters the (re)construction is markedly different to the CESCR's retrogression. As such, it could be asked if it can really be called 'retrogression' at all? The new concept is undoubtedly a distance apart from the old images of the doctrine. Yet, if the well-known current meanings of retrogression are bracketed momentarily, the new and (re)constructed view of retrogression can fairly fit within the term. The idea of 'retrogression' captured within the (re)constructed definition simply highlights a negative effect. This simpler rendering is arguably more intuitive and its direction can be understood without resorting to technical legal definitions. In fact, in comparison with the established ideas of the doctrine, the (re)construction arguably fits more comfortably within the 'retrogression' terminology.

Elsewhere, the (re)construction moves to clarify the type of state activity that it is at issue by linking the definition of a retrogressive 'measure' to any 'action'. While previously, there was uncertainty surrounding the meaning of 'measure' in the context – did it mean a policy measure, a budgetary allocation, a law, or something broader? – the reformulation is more certain. It is clear under the (re)constructed version that a broad view of state activity should be taken. In particular, this approach allows the more diffuse or less formalised

[130] Nolan, Lusiani and Courtis (n 4) 133.

[131] See Chapter 3, p85.

actions to be encompassed, and does not constrain the doctrine to a consideration of legislative or completed policy measures.

Under the CESCR's previously developed views of non-retrogression there was ambiguity around whether omissions could constitute retrogression. Language that traditionally surrounded the doctrine discussed measures that would be 'taken', 'introduced',[132] 'adopted',[133] 'undertaken',[134] Indeed General Comments 14, 15 and 17 deal with retrogression in close connection to an elucidation of the commission/omission divide, seemingly as a specific example of a violation that can occur through 'acts of commission'.[135] This matches the content of the Maastricht Guidelines which characterises retrogression as one of its 'violations through acts of commission'.[136] Yet in later elucidations the CESCR moves towards accepting omissions can constitute retrogression. This is illustrated in its statement on Maximum Available Resources under an Optional Protocol where it is explicitly noted that a 'failure to take steps' can constitute a *prima facie* retrogressive measure.[137] The requirement for a retrogressive measure to be 'deliberate' also contributes somewhat to a 'commission' conceptualisation. Although it is logically possible for a State to deliberately omit to take steps, identification and proof of such scenarios would be excessively difficult.[138]

The (re)constructed version of retrogression avoids the highly criticised commission/omission binary. It does so by encompassing any 'contribution to a trend' within the category of 'actions' that states will be held accountable. This approach avoids the difficulties inherent in holding states culpable for purely unintended (non-deliberate) omissions, while capturing all of those actions and 'contributions' which impact ESR negatively.

4.6. Conclusions

While the previous chapter concluded that many of the doctrine of non-retrogression's problems could be traced to a fragmentation and a lack of purpose, this chapter has taken

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[132] CESCR, *General Comment 13* (n 22) para 45.

[133] CESCR, *General Comment 14* (n 22) para 32.

[134] CESCR, *General Comment 16* (n 2) para 42.

[135] CESCR, *General Comment 14* (n 22) para 48; CESCR, *General Comment 15* (n 45) para 42; CESCR, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15(1)(c) of the Covenant)* (UN Doc E/C12/GC/17 2006) para 42.

[136] 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (SIM 1998) para 14(e).

[137] CESCR, 'MAR under OP' (n 94) para 9; likewise in its Letter to States, the CESCR implicate a 'failure to act' as a factor in considering retrogression; Chairperson of the CESCR (n 2).

[138] See Chapter 8, pp214-219.

the analysis a step further. It has argued that there is a case for the continuation of the doctrine in some form, but that it requires a new purpose in future.

The chapter first addressed retrogression's awkward positioning within the Covenant. This was central to an understanding of the appropriate purpose and place for the (re)constructed doctrine. In particular, the earlier sections addressed the relationship between retrogression and progressive realisation, and the relationship between the doctrine and the respect, protect, fulfil typology.

The implications of defining a new purpose for non-retrogression and (re)constructing the doctrine itself, were also explored. In substance, it was suggested that the future purpose of the doctrine should be to further the progressive realisation obligation. This suggestion was defended on both 'foundational' and 'operational' levels; in sum arguing that that there are symbolic, legal and historical reasons as well as functional rationales for such an orientation of the doctrine.

After setting out this purpose, a (re)constructed doctrine was outlined and brief comments on how this new doctrine might align with the purpose were outlined. A definition of retrogression that is linked to all kinds of action, including contributions to trends was suggested. In addition to a solid legal basis, it was reasoned that such a formulation would allow the CESCR to engage with structural issues of concern and to avoid some of the monitoring pitfalls that currently exist. The new dynamism of the (re)constructed doctrine can contribute something distinctive to the enforcement of the progressive realisation obligation and consequently promote a symbiotic relationship with that obligation.

There remain significant questions surrounding the capacity of the doctrine to address structural threats, its resilience in crises, its responsiveness to micro concerns, and its ability to practically function. These questions are discussed further in the following chapters.

Part II - (Re)constructing Retrogression for a Purpose

Chapter 5

Structural Threats

5.1. Introduction

With a (re)constructed purpose and form, there is a real potential for the doctrine of non-retrogression. Its reformed construction can address areas where the previous incarnations failed. In better supporting the functioning of the progressive realisation obligation, the (re)construction must engage with the barriers to ESR enjoyment on a number of new levels. Those phenomena and problems that affect progressive realisation are far from uniformly local or small scale in nature. Indeed, some of the largest impacts on ESR will naturally flow from the very largest of phenomena.

The previous chapter discussed in brief the ways in which innovations in the (re)constructed doctrine could address the structural pressures that bear upon ESR enjoyment. This chapter unpacks these structural threats and assesses in detail how the CESCR has dealt with them so far. It shows at its conclusion how a package of doctrinal changes within the (re)constructed retrogression, and some broader reforms can bring greater engagement with structural issues.

While the scale of such phenomena often leads to their full effects being hard to capture and understand, Sepúlveda Carmona articulated the magnitude of the most recent crises well when she wrote;

> The onset of the global economic and financial crises, following consecutive fuel and food crises, exacerbated existing deprivations, poverty and inequality, with global ramifications exceeding those of any previous comparable economic downturn. Globally in 2011, 205 million people were unemployed – the highest number since records began. As a result of the crises, at least 55,000 more children are likely to die each year from 2009 to 2015. The prevalence of children dropping out of school has increased, as boys have been propelled into the workforce and girls given an increased burden of household tasks. By 2009, at least 100 million more people were hungry and undernourished, a situation that continues to deteriorate owing to escalating food prices.[1]

Issues of such large scale – and economic crises are not the only phenomena in this category – pose a severe challenge for the ICESCR. Addressing the hunger of 100 million people living in a multitude of political systems, across varied geographies, with diverse socio-economic and cultural backgrounds would be a formidable challenge for even the most effective system of legal and political regulation. For the ICESCR to successfully meet such a

[1] Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 23–4 (extensive footnotes omitted).

challenge looks impossible. And, while calculations of the ICESCR's demise on this basis may seem drastic, if the CESCR fails to demonstrate its ability and preparedness to deal with such large scale issues it is entirely conceivable that NGOs will seek other means of holding States accountable, and the ICESCR's relevance will drain away.

This chapter addresses the CESCR's engagement with the dilemmas posed by structural issues. It does this with the aim of determining patterns in the Committee's current approach and to identify how there might be a better engagement with the structural potential of the progressive realisation and non-retrogression obligations in future.

In speaking to this difficult challenge the following chapter first sketches an outline of the relationship between progressive realisation and these structural issues. It then addresses in some detail the meaning of 'structural engagement' and identifies four levels of engagement. Following this, there is an assessment of the value of the CESCR improving its engagements with structural issues in future before a final section turns to the question of what improvements might be made. A (re)constructed doctrine of non-retrogression and other aspects of the CESCR's operation, are identified as key areas for improvement.

5.2. Situating Progressive Realisation within 'Structural Issues'

The limited ability to engage with structural issues can sometimes be the result of doctrinal limitations of the ICESCR. As noted above, there are conceptual tensions that arise when seeking to address both the very largest and most complex issues[2] with the same tools as address the most individualised of issues. The progressive realisation obligation suffers from exactly this conceptual difficulty. Examples such as the well-known Treatment Action Campaign or Mazibuko cases, demonstrate how these sort of tensions between high-level State policy and individual needs can sometimes arise.[3] While there is a reasonable degree of clarity about what progressive realisation entails for an individual (i.e. effective and expeditious progress), translating this obligation into a large-scale enterprise is more difficult. Individuals will have different needs, will start from different levels of rights

[2] There is little disagreement that addressing ESR on a structural scale is a complex task. See, for example, Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Bloomsbury Publishing 2013) 30–31; Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1(1) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47, 49; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 183. Although it is additionally worth noting that the claim that ESR are 'too' complex to properly be conceived as rights was used in the recent past to denigrate their status; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 160.

[3] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (2002) (CCT8/02) [2002] ZACC 15 (Constitutional Court of South Africa); *Mazibuko and Others v City of Johannesburg and Others* (2009) (CCT 39/09) [2009] ZACC 28 (Constitutional Court of South Africa).

enjoyment, will have different informal means of securing rights, and will require different amounts of time, effort and resource to meet their needs. How does a State formulate a policy to progressively realise the rights of millions of individuals while respecting the nuances of their individual circumstances? How is the success of this process to be measured? When, if ever, can the CESCR find that the State has failed and violated its obligations?

The ICESCR's basis in individual rights can be a limitation on its ability to address such structural issues. Rather than addressing itself to 'ending hunger'[4] (as a generalised prospect), the ICESCR recognises 'the fundamental right of everyone to be free from hunger' (as an individual entitlement).[5] While the successful pursuit of either of these aims would lead to broadly the same outcome, there is a difference between the two that has a bearing on policy formulation, implementation, and progress measurement.

Whether the end goal (of zero hunger, satisfactory social security, or whatever else) is approached with an individual entitlement approach or with a general method, will influence the way in which policy is devised. For example, a strong commitment to an individual's entitlement might focus on localised problems with reflection on individual needs and solutions. This approach has the benefits of recognising – and centring – the ways in which rights deficiencies are a 'lived experience'.[6] This latter emphasis on lived experience illustrates the very personal, very individual ways in which people feel and understand the under-fulfilment of their rights. As such, it has been convincingly argued in the context of austerity that, '[l]ived experience … tells us about much more than the 'economic-ness' of austerity; it shows that austerity is always and already multiple as it is lived'[7]; it can 'bring people back in'.[8] Such a focus on lived experiences supports a recognition of disparate effects through an individual entitlement approach.

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[4] President of the General Assembly, *Draft Outcome Document of the United Nations Summit for the Adoption of the Post-2015 Development Agenda* (UN Doc A/69/L85 2015) rule 2.1.

[5] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) art 11(2).

[6] For background on this term see Max van Manen, *Researching Lived Experience: Human Science for an Action Sensitive Pedagogy* (2nd edn, Routledge 2016) ch 2; Donald Vandenberg, 'Researching Lived Experience: A Review Essay' (1992) 42(1) Educational Theory 119.

[7] Esther Hitchen, 'Living and Feeling the Austere' (2016) 87 New Formations 102, 87–88.

[8] Maya Unnithan, 'What Constitutes Evidence in Human Rights-Based Approaches to Health? Learning from Lived Experiences of Maternal and Sexual Reproductive Health' (2015) 17(2) Health and Human Rights Journal <https://www.hhrjournal.org/2015/11/what-constitutes-evidence-in-human-rights-based-approaches-to-health-learning-from-lived-experiences-of-maternal-and-sexual-reproductive-health/> accessed 20 September 2016. For examples of 'lived experiences', consider the fear of what the official-looking brown envelope might bring for the disabled social security recipient (Kayleigh Garthwaite, 'Fear of the Brown Envelope: Exploring Welfare Reform with Long-Term Sickness Benefits Recipients' (2014) 48(7) Social Policy & Administration 782, 788–789.), or the feelings of mental health patients that the 'service did not trust them and they had to constantly "prove" themselves' (P Fallon, 'Travelling through the System: The Lived

The language and theory of human rights has, of course, tracked elements of such a lived experience approach.[9] The persistence of individual dignity as a grounding concept,[10] and the renewal and application of that concept through processes of participation,[11] are both intended to capture an accurate image of the effects upon individuals[12] and to be used as a springboard to action.[13]

Of course, while such an individualised approach is aimed at more nuanced and targeted policy, there are attendant difficulties. Such high levels of nuance are arguably ill-suited to addressing large scale problems. An approach which ignores or postpones attention to *individual* dignity and lived experience can be more straightforwardly formulated and implemented. Policies – even well-intentioned and broadly good ones – to end hunger, homelessness, or poor sanitation on a general level present a degree of uniformity that makes their execution more possible. The central concern for policies such as these is with a *social* dignity, which disregards (or least de-prioritises) the diverse individual experiences of, and solutions to, rights violations.

This presents a tension for the CESCR; is addressing rights violations more quickly but more bluntly, preferable to a slower but more individualised treatment of the issue? Further, can the ICESCR be read in a manner that supports generalised action that is to the (marginal) detriment of individualised responses?

Even if such questions of strategy are satisfactorily resolved, there are a range of legal questions to address. Considering whether the rights of an individual have been progressively realised appears straightforward. If an individual or local group claims that rights have not been progressively realised in accordance with article 2(1)[14] there is a clear path to determining if a violation has occurred. An assessment of the progress made is combined with a consideration of the available resources and other factors. This apparently

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Experience of People with Borderline Personality Disorder in Contact with Psychiatric Services' (2003) 10(4) Journal of Psychiatric and Mental Health Nursing 393, 398.).

[9] For a complication of the arguments presented here see Eric Heinze, 'Reality and Hyper-Reality in Human Rights' in Rob Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012) 198 (arguing that human rights are not driven by lived experience, but instead the (media) representation of that experience).

[10] See, for example, discussion in Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of international Law 655; Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76(2) American Political Science Review 303.

[11] The elements of which have most clearly been analysed in the children's rights context; Laura Lundy, '"Voice" Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) British Educational Research Journal 927 (although note the qualifications at 931 regarding the differences between the requirements of art 12 of the CRC and 'participation').

[12] Daniel Rothenberg, 'The Complex Truth of Testimony: A Case Study of Human Rights Fact Finding in Iraq' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 196, 200.

[13] ibid 198.

[14] *International Covenant on Economic, Social and Cultural Rights* (n 3) art 2(1).

simple process is, of course, more complicated in practice. Intricate questions arise, such as; whether progressive realisation and available resources should be assessed as separate obligations?[15] Which metrics should be used to determine 'resources' and 'progress'?[16] Are other factors such as restraints upon the State, or particular effects upon marginalised groups relevant in assessing a breach?[17] Although such questions complicate the consideration of an individual issue, the Committee can coherently seek clarification and support in its previous normative outputs.

The CESCR makes such determinations on potential violations of the rights of individuals or local groups in the context of both Concluding Observations and Optional Protocol Communications.[18] The latter of these engagements provide particularly clear examples of the Committee applying the ICESCR to a concrete situation. While the Communications procedure is in its infancy, it is predicted that where authors of Optional Protocol Communications[19] are willing to invoke the problematic[20] progressive realisation obligation many of the Communications will follow this pattern of 'contained' engagement with the issues.[21] It is in the strategic interests of Communication authors to identify a clearly defined issue and a remedy that could be endorsed by the CESCR. Indeed, this pattern of defined issues and bounded solutions can be seen in the complaints work of the Human Rights Committee.[22] That Committee is often presented with a question related to a narrow set of circumstances and responds with a solution that addresses those circumstances and no more. This 'bounded' approach has so far been visible in one of the CESCR's substantive views on an Optional Protocol Communication.[23] An ability to come to determine specific remedies in response to specific issues is, in many situations, a positive. It is, after all, the

[15] Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights' (1994) 16 Human Rights Quarterly 693, 702.

[16] ibid 703ff.

[17] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 para 8.

[18] For an example of the former see the CESCR's concern with the rights of the traveler communities in Ireland; CESCR, *Concluding Observations: Ireland* (UN Doc E/C12/1/Add77 2002) paras 20, 32-33.

[19] 'Author/s of a communication' is the term that has been adopted by the CESCR to refer to an individual or group who have brought their 'case' to the Committee; CESCR, *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Adopted by the Committee at Its Forty-Ninth Session* (UN Doc E/C12/49/3 2012) rule 3. The use of 'author' is used in other treaty body complaints mechanisms also, and is notable for its de-legalization of the processes (those bringing a 'case' usually being referred to as 'complainants', 'plaintiffs', or 'applicants').

[20] See discussion of some of the problems with progressive realisation in Chapter 2, pp12-16 and Chapter 3, p88.

[21] In a more positive sense, such a focus can be framed as a commitment to 'effective remedies'; Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39, especially 46.

[22] Sam Blay and Ryszard Piotrowicz, 'The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law' (2000) 21 Australian Year Book of International Law 1, 4.

[23] IDG v Spain [2015] CESCR Communication 2/2014, UN Doc. E/C.12/55/D/2/2014.

raison d'etre of the Optional Protocol Communications procedure and was a key feature of arguments encouraging the Protocol's adoption.[24]

On the other side of the large scale-small scale tension, it can be seen that the determination of the meaning of progressive realisation in larger, more complex contexts poses a different set of issues. While the obligation has traditionally and officially been said to require States 'to move as expeditiously and effectively as possible towards the [full realisation of the rights]',[25] this provides little by way of guidance for States. Dowell-Jones is unforgiving in her critique of the 'insufficiency' of progressive realisation and other obligations in guiding States' fiscal policy choices.[26] When counterposed against the deep complexity of state policy making – involving budgetary deficits, tax policy, competing resource claims, long-term and short-term priorities, and international markets, to name only a minority – the 'guidance' of article 2(1) essentially requiring States to improve their performance in a broad range of social goods is derisory. Clearly, there is a need for greater attention to the role and meaning of the progressive realisation obligation at the level of State policy. However (and as discussed below) stopping at a definition of progressive realisation within State policy would also be inadequate. The policies of individual States are increasingly unable to address the globalised structural issues that most threaten ESR. Rather, a more systematic assessment of the various levels of potential engagement is required in order that more effective roles can be imagined for different actors and for progressive realisation and non-retrogression.

It is, in particular, the failure of progressive realisation to speak to state-level policy-making that makes a full examination of the full range of possible engagements with structural issues crucial. However effective an individual complaints mechanism might be in offering contained solutions for individuals, it is unlikely to contribute significantly to the understanding of progressive realisation in structural or macro situations.[27]

5.3. 'Structural Engagement'

The meaning of 'structural engagement', in its simplest sense, evokes notions of 'action' in relation to 'large' issues, yet it requires expanded discussion. In particular, the discussion

[24] Malcolm Langford, 'Closing the Gap? - An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27(1) Nordic Journal of Human Rights 1, 7.

[25] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) para 9.

[26] Mary Dowell-Jones, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (2015) 15(2) Human Rights Law Review 193, 211.

[27] ibid 218ff.

below settles on a definition of full structural engagement that involves action on the largest (macro) and 'root cause' issues.[28] Before reaching this type of engagement, the section addresses the 'other', lesser kinds of action on smaller scale issues that can be taken by the CESCR, and provides examples of these engagements. In total, it identifies four sorts of (potential) engagement with structural issues and draws these together into a typology.

The literature offers disparate conceptions of structural or macro issues. However, it is possible to gather these definitions into a multi-layered conception of the application of rights. Four different levels of action coupled to the varying scale of the issue can be identified (figure 7). These types of action move through the relatively straightforward application of the ICESCR to the claims of individuals and small groups, to a consideration of larger webs of issues, and ultimately towards the structural flaws in systems of governance. Of these four types of action, the CESCR has ordinarily engaged with the first three. In substance, this means that the work of the Committee has predominantly focussed on; 1) the application of existing legal doctrine; 2) noting the progress of existing processes; and 3) encouraging the advancement of new processes. This, as examples below demonstrate, amounts to a limited engagement with the structural issues of concern.

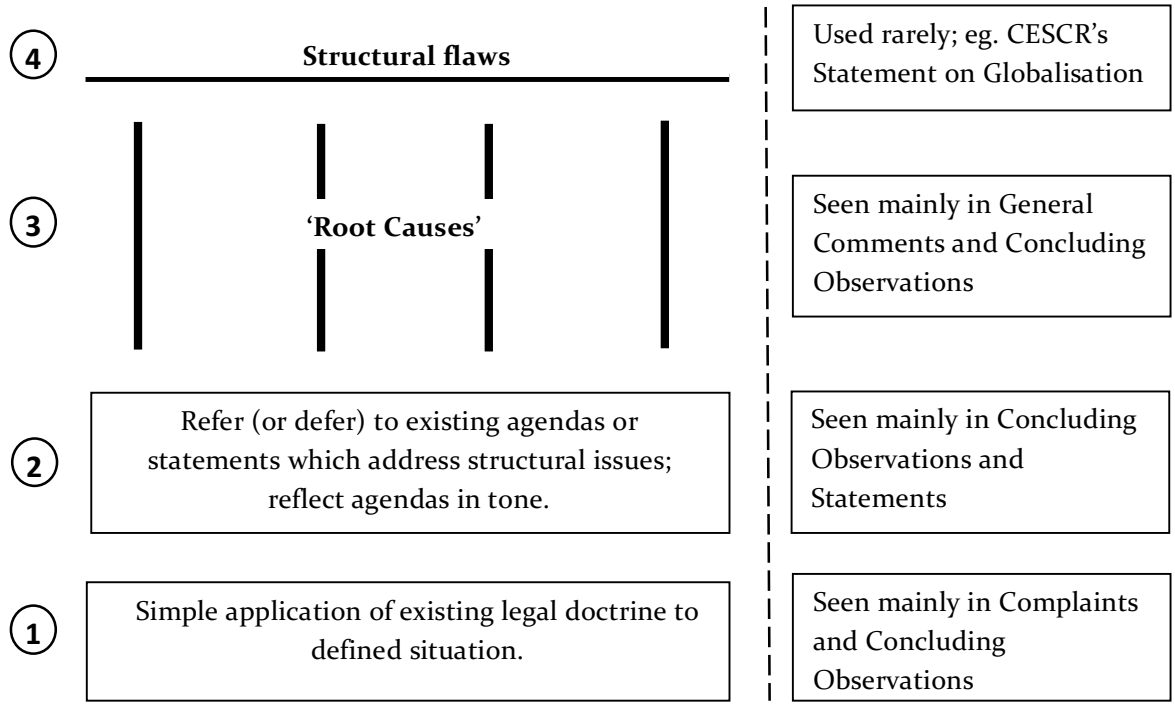

Figure 7

[28] Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) The Modern Law Review 57.

5.3.1. Level One

At the bottom of the types of rights action is the application of existing legal doctrines to defined situations (number 1 in figure 7). This sort of role arises in the adjudication in the situations of individuals or groups and can take place in either Optional Protocol Communications or in certain parts of examinations of States Parties. As such applications are grounded in a specific situation, it is usually possible for the adjudicative body to avoid embroilment in larger and more complex issues and therefore they entail negligible engagement with more structural issues. This sort of straightforward application of the ICESCR to specific facts, is seen in the two substantive views that the CESCR has released under the Optional Protocol so far.[29]

However, this pattern is not evidence for the sceptics' arguments which seek to use limitations in ESR adjudication to demonstrate some flaw in the foundations of the rights.[30] While any critique of the CESCR's adjudication[31] is liable to occasionally cover sceptics' ground, key tenets and premises of sceptics' arguments differ. Here it is clear that the determination of ESR violations is not inherently problematic. Instead the argument here is that the CESCR's current processes and doctrines might go further in addressing structural threats. [32]

In their adjudicatory-type activities, avoiding such large scale issues can be seen as a 'coping strategy' for UN human rights bodies. In other words, taking a closely circumscribed approach to adjudication allows the bodies to cope with their lack of enforcement powers and to provide some tangible remedies for individuals. Indeed, rather than a concern with the side-lining of structural issues, the development of a system of individual adjudication for the CESCR was more concerned that a structural approach would prevent the pursuit of individual justice. As such it has been argued that:

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[29] *López Rodríguez v Spain* [2016] CESCR Communication 1/2013, UN Doc E/C.12/57/D/1/2013; *IDG v Spain* [2015] CESCR Communication 2/2014, UN Doc E/C.12/55/D/2/2014.

[30] Those which dismiss ESR as non-justiciable, having a different 'nature' (summarised in Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' [2007] Center for Human Rights and Global Justice, Working Paper Number 15, 7–10) or as being non-legal propositions (see, for example, EW Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 Netherlands Yearbook of International Law 69).

[31] Understood as a 'means of settling disputes or controversies'; Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353, 357.

[32] As such, aspects of the analysis here might also be applied to CPR where those rights also fail to address structural issues. See for example of similar critiques being applied to civil and political rights; Marks (n 27).

> [t]he fact that there may be multiple causes of poverty and a broad range of remedial options can no longer justify adjudicative acquiescence to serious and widespread violations of fundamental human rights.[33]

Such a demand for effective remedies might have strong foundations, and remedies are of course important to being able to deliver on its transformative potential.[34] However complex structural issues do not 'lend themselves to the identification of singular acts or violations or simple remedial orders'[35] and in practice the system relies on the adjudicative body being mandated to take a reductive approach to large-scale issues.

This filtration of structural concerns through variable standards[36] and intensities[37] of review effectively facilitates the consideration of an individual or small group issue. This type of review is not in itself a problematic method for protecting ESR for individuals and defined groups,[38] however the approach is not well-placed for addressing issues of a much larger scale.

This inaptitude can be seen in national jurisprudence[39] and in the CESCR's first views issued under the Optional Protocol Communication process.[40] In the Communication lodged against Spain a woman complained that the process that led to foreclosure of her mortgage following several missed payments was in violation of her right to housing (taken together with the article 2(1) obligation 'to take steps … by all appropriate means, including particularly the adoption of legislative measures'). The observations of the author, State, and third party intervener, and the CESCR's adjudication centres overwhelmingly on the individual case. However, allusions are made towards the more significant and substantive issues; the economic and social crises in Spain, the very large numbers of foreclosures and evictions,[41] and the high levels of unemployment.[42] In this instance, the process of adjudication misidentifies the culprit of the rights violation as mortgage foreclosure

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[33] Porter (n 20) 40.

[34] M Pieterse, 'On "dialogue", "translation" and "voice": A Reply to Sandra Liebenberg' in Stu Woolman and Michael Bishop (eds), *Constitutional Conversations* (Pretoria UP 2008) 33.

[35] Porter (n 20) 52.

[36] Anashri Pillay, 'Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights' (2007) 6 European Human Rights Law Review 616.

[37] Anashri Pillay, 'Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom' (2013) 3 Public Law 599.

[38] Although cf David Bilchitz, 'Towards a Theory of Content for Socio-Economic Rights' in Julia Iliopoulos-Strangas and Theunis Roux (eds), *National and International Perspectives on Social Rights* (Ant N Sakkoulas/Bruylant 2008).

[39] Arguably visible in, for example, Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000 (11) BCLR 1169 (CC); Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC); European Roma Rights Centre v. Portugal (Complaint No. 61/2010) (Euro. Soc. Charter).

[40] *I.D.G. v Spain* (n 28).

[41] ibid 3.2.

[42] ibid 6.2.

procedures (complete with a legal and State-centric emphasis), and in doing so minimises or erases the substance of the rights claim. Even a Committee predisposed to addressing structural issues, would struggle to address issues of fiscal austerity, macroeconomic choices, and/or the role of international financial institutions within the Communications process.

A similar dynamic can be observed in some parts of some of the Concluding Observations issued by the Committee. Where the CESCR discusses a rights issue of a group within the State it does so as a vignette of the larger issue.[43] So, for example, the Committee might discuss the insecure housing tenure of urban dwellers, without taking the issue-at-large of shrinking housing stocks and commodification. As with Optional Protocol Communications, this does not in itself represent a particular problem, and on the contrary, does add to the enforcement of ESR. However, in the same manner as the Optional Protocol Communications, this type of engagement falls short of addressing the structural issue and instead addresses one of its symptoms (the effects upon a small group). This is not to say that adjudicatory-type activities by the CESCR will have no effect upon structural issues, but only that structural issues are not directly addressed or considered in this mode of working. This is an important distinction as it highlights the general possibility of adjudication on an individual case to influence the 'future relations' of a range of actors within the attention of the Committee.[44] For example, an individual case might be so symbolic of the larger issue that a CESCR finding on it is seen within the national polity as an indictment of the policy-at-large. In this regard, the CESCR affects 'social ordering' that is more likely to touch upon structural issues even without directly addressing those issues.[45]

The most recent Concluding Observations on Germany provide a good (but not atypical) example of this type of engagement within the State examination process. In three consecutive paragraphs, the CESCR notes 'concerns' with the protections afforded to three groups (homeless persons, transsexual and intersexed persons, and older persons in nursing homes).[46] It is arguable that the issues of these groups are traceable to some embedded structures of inequality, issues with the economic system, and/or changing population

[43] O'Flaherty notes that in Concluding Observations it is 'commonplace for recommendations to propose approaches which are … very case-specific'; Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6(1) Human Rights Law Review 27, 36.

[44] Lon L. Fuller (n 30) 357.

[45] ibid.

[46] CESCR, *Concluding Observations: Germany* (UN Doc E/C12/DEU/CO/5 2011) paras 25-27. For further examples of groups considered by the CESCR see; Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 737–738.

demographics. Criticism of Ireland's system of direct provision[47] provides another example. Both the Human Rights Committee[48] and the CESCR[49] offered their criticisms of the deficient system, but the inhumane nature of the system and the structural othering of asylum seekers is left unaddressed.[50] There are many other examples of this dynamic in the CESCR's work in everything from poverty[51] to caste-based discrimination.[52]

Yet, in some of these cases the CESCR makes basic recommendations that measures or reporting is improved, as a substitute for a full engagement with the structural issues. Such recommendations address only the rights violations faced by the mentioned groups and, therefore, fail to directly engage with the broader structural issues. There remains potential that the CESCR can have indirect influence upon structural problems through such limited recommendations. However, such a strategy relies upon the CESCR producing a large enough volume of recommendations, or them having an impact large enough to affect related issues. Neither of these tactics are currently viable.

Affecting all of the CESCR's activities in future, but particularly in respect of Concluding Observations, will be the Treaty Body strengthening process. With severe time limits upon its activities,[53] and increasingly constrained word limits upon documentation, the Committee will be directed towards shorter analyses of the causes of rights violations.[54] A recent resolution of the General Assembly '*encourage[d]* the human rights treaty bodies to adopt short, focussed and concrete concluding observations, including the recommendations therein'.[55] This resolution and its associated sentiment would seem to further threaten the possibility of full engagement with structural issues.

5.3.2. Level Two

With the CESCR's applications of existing legal doctrines being ill-suited to full structural engagement, do other levels of engagement hold more promise? The next level of the

[47] A system of highly restrictive substitutes for full social security entitlements given to asylum seekers in the country. Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland' (2014) 3(2) Irish Community Development Law Journal 22, 25–26.

[48] Human Rights Committee, *Concluding Observations: Ireland* (UN Doc CCPR/C/IRL/CO/4 2014) paras 19-20.

[49] CESCR, *Concluding Observations: Ireland* (UN Doc E/C12/IRL/CO/3 2015) para 14.

[50] Thornton (n 46) especially 23.

[51] CESCR, *Concluding Observations: Bolivia* (UN Doc E/C12/1/Add60 2001) paras 13, 39.

[52] CESCR, *Concluding Observations: India* (UN Doc E/C12/IND/CO/5 2008) para 14.

[53] Navanethem Pillay, *Strengthening the United Nations human rights treaty body system* (United Nations Human Rights Office of the High Commissioner, 2012) 31.

[54] UN General Assembly, *Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System* (UN Doc A/RES/68/268 2014) paras 15, 16.

[55] ibid para 6.

typology (level two) goes beyond such applications of doctrine. It begins engagement with structural problems through references to others' work. Such engagement moves the ICESCR system closer to dealing with structural problems.

This method of engagement foregrounds the structural engagements of other bodies or organisations. Thus, when the CESCR has acknowledged the post-2015 drafting process it has not always been in substantive terms.[56] Many of these interventions do not contribute a novel (or *any*) analysis of the structural issues at stake. On offer instead is a simple *recognition* of the efforts. Further, as agendas targeting structural issues become established and their language embedded, this recognition by the CESCR extends to an ingestion of a new tone and thrust.

It is important, as with the adjudication aspects discussed above, to note that such deferential actions by the Committee are not entirely negative. They can contribute normative consistency, cultivate inter-relationships between international organisations and agendas, and reinforce the norms of the ICESCR. However, if such actions are the CESCR's only or primary engagement with structural issues, then it becomes difficult for the CESCR to develop its own analysis of structures and to demonstrate how an ICESCR approach to structural problems is distinctive from, for example, an International Labour Organisation or a World Bank approach.

The CESCR's engagement with structural issues in its Concluding Observations can be disappointingly weak and can amount to an erasure of the structural issues. However, on occasion the Concluding Observations are used to greater effect to highlight a broader trend that is having a bearing on ESR. Thus, while the CESCR has not gone so far as to use the term 'structural discrimination'[57] the Committee invokes conceptually similar notions of 'patterned' or 'societal' discriminations.[58] In one example the Committee notes the 'persistent discrimination against Roma people'.[59] While these are welcome 'nods' towards the larger issues at play, the responses of the CESCR remain limited. In the example above, despite identifying the persistence of the discrimination, the CESCR limited itself to requiring the State to reconsider its position on recognising minorities, to ratify a regional

[56] Chairperson of the CESCR, 'Letter Dated 30th November 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc CESCR/49th/AP//MAB.

[57] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) 60 (cf the approach of the CEDAW committee at 78).

[58] Vandenhole (n 56) 60.

[59] CESCR, *Concluding Observations: Greece* (UN Doc E/C12/1/Add97 2004) para 11. See for further examples, Vandenhole (n 56) 61.

treaty, to investigate, to continue training, and to raise awareness.[60] It is also notable that this minimal engagement with the effect of 'structures' upon rights takes place in the context of discrimination; the norm that has most often been thought of as structural. Close attention to the structural effects of economic systems or of ecological changes, are likely to be some way off.

Actions by the CESCR that illustrate the tendency to invoke external standards can be seen in its Concluding Observations, Statements, and General Comments. Thus deference can be seen to the standards of the Millennium Development Goals (MDGs),[61] the Paris Principles on NHRIs,[62] the 0.7% aid commitment,[63] and very frequently to the standards of the International Labour Organisation.[64] Such references are useful for their reinforcement of existing standards and as a shortcut to a larger body of analysis on a particular issue. However, in just these four examples of deference[65] the CESCR substantially surrenders its voice on development and its financing, a key mechanism of state accountability, and on standards of work and social security. The CESCR's accession to the views of these various agreements and bodies is all the more notable for the potential divergences between the procedural and substantive approach of the ICESCR and those bodies. It is widely acknowledged, for example, that the MDGs neglected to properly engage with human rights standards,[66] and it is clear that while the ILO has a nascent human rights agenda, this falls well short of the range of standards in the ICSECR.[67] A 'target' for 'rich countries' to contribute 0.7% of their GNP to development has its roots more in realpolitik than in

[60] CESCR, *Concluding Observations: Greece* (n 58) paras 31-32.

[61] For a sample see CESCR, *Concluding Observations: San Marino* (UN Doc E/C12/SMR/CO/4 2008) para 18; CESCR, *Concluding Observations: Afghanistan* (UN Doc E/C12/AFG/CO/2-4 2010) para 4; CESCR, *Concluding Observations: Sri Lanka* (UN Doc E/C12/LKA/CO/2-4 2010) para 5; CESCR, *Concluding Observations: Ecuador* (UN Doc E/C12/ECU/CO/3 2012) para 23; CESCR, *Concluding Observations: China* (UN Doc E/C12/CHN/CO/2 2014) para 5.

[62] For a sample see CESCR, *Concluding Observations: Mongolia* (UN Doc E/C12/1/Add47 2000) para 19; CESCR, *Concluding Observations: San Marino* (n 60) para 19; CESCR, *Concluding Observations: Kyrgyzstan* (UN Doc E/C12/1/Add49 2000) para 25; CESCR, *Concluding Observations: Jordan* (UN Doc E/C12/1/Add46 2000) para 26.

[63] UN Millenium project, 'The 0.7% Target: An in-Depth Look' (26 October 2015) <http://www.unmillenniumproject.org/press/07.htm> accessed 20 September 2016. For a sample in the Committee's work, see CESCR, *Concluding Observations: Belgium* (UN Doc E/C12/1/Add54 2000) para 16; CESCR, *Concluding Observations: Finland* (UN Doc E/C12/1/Add52 2000) para 13; CESCR, *Concluding Observations: United Kingdom* (UN Doc E/C12/GBR/CO/5 2009) para 9; CESCR, *Concluding Observations: Netherlands* (UN Doc E/C12/NDL/CO/4-5 2010) para 4(e).

[64] For a sample see CESCR, *Concluding Observations: San Marino* (n 60) para 20; CESCR, *Concluding Observations: Georgia* (UN Doc E/C12/1/Add42 2000) para 3; CESCR, *Concluding Observations: Poland* (UN Doc E/C12/1/Add82 2002) para 44; CESCR, *Concluding Observations: Estonia* (UN Doc E/C12/1/Add85 2002) para 35.

[65] For others see; CESCR, *Concluding Observations: Georgia* (n 63) para 4 (deference to a wide range of international organisations on the question of poverty); CESCR, *Concluding Observations: Estonia* (n 63) para 54 (environmental protection).

[66] Summarising the critiques of others Alston notes, 'The MDGs do not contain any particular focus on rights, thus effectively sidelining rights as though they were a marginal or token issue' Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' (2005) 27(3) Human Rights Quarterly 755, 765.

[67] See for example; ILO Declaration on Fundamental Principles and Rights at Work (Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998), especially para 2.

human rights standards.[68] It is ironic that the Committee would defer to these agendas despite the fact that many of them are grounded in declarations or agreements that fall well short of the firmly binding character of the ICESCR.

Even if caution about undermining important progress and international consensus on structural issues prevented the Committee from unpacking key concepts, there remains space for discussion. For example, in relation to aid expenditure, the CESCR might not wish to undermine the sufficiency of the target, but it could easily note that human rights standards speak to the manner in which the money is raised and expended. Similarly the Committee might reinforce the relevance of existing ICESCR norms (for example, international assistance[69]) to the target, or go even further to assess whether a State meeting the target would be in compliance with its ICESCR obligations. There is some recent evidence of the Committee attempting to capitalise on increased attention to an area while setting out the Covenant requirements. A good example of this is where the CESCR notes that it 'does not agree with such [a limited] interpretation' of the human rights duties of the IMF and International Bank for Reconstruction and Development.[70] More of this 'piggybacking' onto international agendas would allow the CESCR to continue using this shortcut to structural issues while also demonstrating the complementarities and divergences of the ICESCR framework on these key structural issues. The CESCR's distinctive approach can be maintained even as it attaches to established agendas.

An additional trend in this regard is the CESCR's tendency to avoid detailed discussion of structural issues in Concluding Observations by referring to its own Statements and Letters. This places an especial significance upon the quality of the structural engagement in those documents, as in many cases the Committee adds very little or nothing when raising the issue in the Concluding Observations. For example, of the 68 States that have been examined since the release of the Letter, [71] 19 have been reminded of it or have had its wording reproduced in their Concluding Observations[72] while thicker conceptions of

[68] Michael A Clemens and Todd J Moss, 'The Ghost of 0.7 per Cent: Origins and Relevance of the International Aid Target' (2007) 6(1) International Journal of Development Issues 3.

[69] *International Covenant on Economic, Social and Cultural Rights* (n 3) art 2(1).

[70] CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (UN Doc E/C12/2016/1 2016) para 8.The Committee also does this to an extent when it suggests that 'Egypt's obligations under the Covenant should be taken into account in all aspects of its negotiations with international financial institutions'; CESCR, *Concluding Observations: Egypt* (UN Doc E/C12/1/Add44 2000) para 28.

[71] Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW.

[72] In the CESCR's *Concluding Observations: Angola* (UN Doc E/C12/AGO/CO/4-5 2016) para 8; *Concluding Observations: Sweden* (UN Doc E/C12/SWE/CO/6 2016) para 30; *Concluding Observations: United Kingdom* (UN Doc E/C12/GBR/CO/6 2016) para 19; *Concluding Observations: Canada* (UN Doc E/C12/CAN/CO/6 2016) para 10; *Concluding Observations: Greece* (UN Doc E/C12/GRC/CO/2 2015) para 8; *Concluding Observations: Italy* (UN Doc E/C12/ITA/CO/5 2015) para 9; *Concluding Observations: Sudan* (UN Doc E/C12/SDN/CO/2 2015) para 18; *Concluding Observations: Iraq* (UN Doc E/C12/IRQ/CO/4 2015)

retrogression or crisis issues have largely remained absent. Likewise, the CESCR's 2001 statement on poverty is a frequent point of reference in Concluding Observations (being mentioned in excess of 80 times).[73]

Yet, despite the importance that is placed on those Statements and Letters, they contain similar deferential trends. The CESCR's statement on the corporate sector, for example, relies heavily on the work of other bodies in order to construct a continuous narrative on the issue. In this case, part of the need to look to the work of the ILO and Human Rights Council might be due to the Committee's own lack of systematic attention to the issue.[74] In turn this inattention could be due to a range of factors including capacity and expertise.

In another instance, the CESCR's Letter to States on the financial and economic crises relies on rhetorical devices to show deference to States and to inflate the importance of (neo-liberal) market-based idea(l)s. For example, there is a flat acceptance that 'a lack of growth, impede[s] the progressive realisation of economic, social and cultural rights', and a reminder that States should 'avoid at all times' denials of socio-economic rights.[75] This was weak and simplistic response to a devastating and complex crisis.[76] The response in the Letter neatly demonstrates the Committee's current unwillingness or inability to engage with important structural issues in parts of its work. In this instance in particular it is plausible that the controversy which surrounded crisis responses contributed to the Committee's reticence to engage fully. Indeed, it was only recently when that controversy had subsided that the Committee released a longer, more substantive treatment of austerity.[77] That Statement is, in some senses, a stronger rebuke to austerity governments and cavalier approaches of international financial institutions. However, as the Statement followed the CESCR's weak treatment of the crises in its Letter, it is effectively bound within

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para 16; *Concluding Observations: Ireland* (n 48) para 11; *Concluding Observations: Portugal* (UN Doc E/C12/PRT/CO/4 2014) para 6; *Concluding Observations: Slovenia* (UN Doc E/C12/SVN/CO/2 2014) para 8; *Concluding Observations: Romania* (UN Doc E/C12/ROU/CO/3-5 2014) para 15; *Concluding Observations: Czech Republic* (UN Doc E/C12/CZE/CO/2 2014) para 14; *Concluding Observations: Ukraine* (UN Doc E/C12/UKR/CO/6 2014) para 5; *Concluding Observations: Japan* (UN Doc E/C12/JPN/CO/3 2013) para 9; *Concluding Observations: New Zealand* (UN Doc E/C12/NZL/CO/3 2012) para 17; *Concluding Observations: Iceland* (UN Doc E/C12/ISL/CO/4 2012) para 6; *Concluding Observations: Bulgaria* (UN Doc E/C12/BGR/CO/4-5 2012) para 11; *Concluding Observations: Spain* (UN Doc E/C12/ESP/CO/5 2012) para 8. See further Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights* (Hart 2013) 51–52.

[73] For a representative example see; CESCR, *Concluding Observations: People's Republic of China* (UN Doc E/C12/1/Add107 2005) para 59.

[74] CESCR, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights* (UN Doc E/C12/2011/1 2011) para 2.

[75] Chairperson of the CESCR (n 70) 3, 5.

[76] See further Chapter 6.

[77] CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (n 69).

that earlier analysis, and it thus limited to repeating large parts of it.[78]

The CESCR, in its other Letter – relating to the Post-2015 development agenda – similarly fails to offer a full engagement with structural issues. While the Committee might have laid down substantive targets and defined key human rights issues, instead its limited analysis (while still useful) is focussed on matters of how benchmarks, indicators and data are incorporated and used. Perhaps in ideal circumstances the CESCR would have produced a series of position papers as the drafting process was ongoing, highlighting where the drafts would fall short of the ICESCR's requirements and where greater ambition was needed. It was, after all, in the Committee's own work that it was once said that 'development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights'.[79] Yet this early statement seems to have since been forgotten.

In other discussions of development, the CESCR has sought to emphasise its active involvement with the right to development.[80] Even in the CESCR's own terms, however, its activities 'complement'[81] other declarations and processes rather than shape or lead on the issues. It is therefore very difficult to determine the position of the Committee on the substance of development. Instead there are fairly meaningless statements offered about the 'linkage and the synergy between' the ICESCR and the Declaration on the Right to Development.[82]

Finally, in its General Comments the CESCR can also been seen to offer deference to existing agendas which address structural issues. In General Comment 18 the Committee can be seen to defer to the definition of the ILO on forced labour, and also defers to that body in relation to the termination of employment.[83] Although, unusually, an ILO convention is mentioned in the ICESCR itself the references in the General Comment go well beyond that mandate and accept the ILO position on additional matters.[84] This use of ILO definitions goes beyond the simple cooperation of the institutions and represents the CESCR subordinating itself on these issues.

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[78] ibid para 4.

[79] CESCR, *General Comment 2: International Technical Assistance Measures (Art. 22 of the Covenant)* (UN Doc E/1990/23 1990) para 7.

[80] CESCR, *Statement on the Importance and Relevance of the Right to Development, Adopted on the Occasion of the Twenty-Fifth Anniversary of the Declaration on the Right to Development* (UN Doc E/C12/2011/2 2011) especially para 6.

[81] ibid paras 5, 6.

[82] ibid para 7.

[83] CESCR, *General Comment 18: The Right to Work (Art 6 of the Covenant)* (UN Doc E/C12/GC/18 2005) paras 9, 11.

[84] *International Covenant on Economic, Social and Cultural Rights* (n 3) art 8(3).

Elsewhere, General Comments have referred to studies submitted to the General Assembly,[85] to United Nations Principles for Older Persons,[86] initiatives of the General Assembly and the Commission on Human Rights,[87] and the Rio Declaration on Environment and Development[88] amongst many others.

The persistent references to the UDHR might also be considered an example of deference.[89] In resorting to the Declaration the CESCR is elevating the (authority of the) UDHR's treatment of issues over the CESCR's own despite the Declaration not having been subject to the same level of scrutiny or normative development and being essentially non-binding. Of course, in some cases the Committee's reference to the UDHR will simply be a demonstration of the history of a right, but where such references are for the purposes of legitimation or to provide an alternative set of norms then they arguably become more problematic.

Across a range of the CESCR's work, there is a practice of emphasising linkage and of deferring to the analyses of other processes. This can be seen in varying degrees in its Concluding Observations, Letters, Statements, and General Comments. While there is undoubtedly a positive role for such deference and 'piggybacking', its prominence in these documents demonstrates how the Committee's work dodges full discussion of structural issues. On a functional level, such an approach is contrary to the position that the CESCR sought to establish in its early work, where in demanding terms it encouraged international organisations to take account of the CESCR's work.[90]

The discussion above is not to attach blame to the CESCR for this approach. Factors such as expertise and, importantly, capacity are likely to have a significant bearing in its choice to defer to established process. Neither is it to say that all of the CESCR's work defers to others' analyses. As will be seen below, in other instances there is a greater degree of engagement by the body.

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[85] CESCR, *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights* (UN Doc E/C12/1997/8 1997) para 5.

[86] CESCR, *General Comment 6: The Economic, Social and Cultural Rights of Older Persons* (UN Doc E/1996/22 1995) para 19.

[87] CESCR, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (UN Doc E/C12/1998/25 1998) para 1.

[88] CESCR, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (UN Doc E/C12/2002/11 2002) para 55.

[89] See, eg, CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 2; CESCR, *General Comment 15* (n 87) para 5; CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)* (UN Doc E/C12/2005/4 2005) para 1; CESCR, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15(1)(c) of the Covenant)* (UN Doc E/C12/GC/17 2006) paras 3, 12, 13, 15; CESCR, *General Comment 18* (n 82) paras 3, 9; CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 6.

[90] CESCR, *General Comment 2* (n 78) paras 4-5.

5.3.3. Level Three

Drawing on Susan Marks' work, level three has been termed engagement with 'root causes'. While her work identifies a general uptick in attention to 'root causes' within human rights work,[91] Marks is troubled by the meaning given to the term. The two broad brands of root cause are; human rights violations as a root cause of other regrettable situations (eg. of conflict), and phenomena which are 'root causes' of human right violations.[92] It is the latter of these relationships that has become the dominant focus of what Marks terms 'the explanatory turn in international human rights' and is also central to the discussion here.[93]

One strand of the critique of a 'root causes' approach focusses on the insufficient depth of the causes identified. Examples are given of root causes that are isolated from their cultural context[94] and the erasure of historical context to identify the root cause of Haitian poverty 'not as the outcome of determinate forces and relations…but as local dysfunctions and accidents of history'.[95] Marks' key concern is that, in general, human rights institutions stop short of identifying the true cause of human rights violations. This leads to a documentation of root causes which are not truly 'root' or 'causes', but rather – according to Marks – are effects of a broader phenomenon.[96] This understanding leads Susan Marks to suggest that:

> attention is directed at abuses, but not at the vulnerabilities that expose people to those abuses. Or there is a discussion of vulnerabilities, but not the conditions that engender and sustain vulnerabilities. Or the focus is turned to the conditions that engender and sustain vulnerabilities, but not to the larger framework within which those conditions are systematically reproduced.[97]

In concrete examples, this might mean a focus on the indicator statistics of climate change (e.g. a global temperature rise of 0.87°C[98]), while the underlying conditions of environmental destruction are unaddressed; or attending to the effects of an economic crisis, while the hegemonic macroeconomic system is unchecked; or discussion of the harmful effects of discrimination, while leaving the systematic forms of racial, gender, wealth, and other inequalities to continue. In the terms of a metaphor, addressing false root

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[91] Marks (n 28) 60, fn16.

[92] ibid 61.

[93] ibid 63.

[94] ibid 64.

[95] ibid 66–67.

[96] ibid 70.

[97] ibid 71.

[98] NASA, 'Global Land-Ocean Temperature Index' <http://climate.nasa.gov/system/internal_resources/details/original/647_Global_Temperature_Data_File.txt> accessed 20 September 2016.

causes is akin to addressing the destructive behaviour of a puppet without thinking of the puppeteer.

It is possible to go a small step beyond this root cause analysis, to think further about the relationship between the false 'root cause'[99] and the true structural cause. We can conceptualise the false roots as having a stranded relationship to the actual/macro/structural source of the human rights violation. Illustrated above in figure 7, this 'stranded' relationship is intended to convey that issues of a structural scale are rarely connected to individuals in a linear manner. Rather a single structural issue can, through multiple 'root causes', affect individuals in a whole range and manner of ways. Take, as an example of a structural issue, the neoliberal political and economic paradigm. The stranded effects of this include fiscal austerity, privatisation, outsourcing, and periodic crises. Another example of a structural issue is gender inequality. One stranded effect of this systematic inequality might be direct or indirect discrimination. However other strands that flow from systematic gender inequality might be economic biases, certain cultural dispositions, and/or the construction of various social practices.

This stranded picture emphasises the linkages between root causes (e.g. between economic and cultural dimensions) and the way in which structural issues (at level 4 of the categorisation) result in more than one serious effect (at level 3). In addition, the futility of addressing only one purported root cause is highlighted, as without addressing the structural issue strands will be maintained and will continue to emerge. To stretch the puppet metaphor still further, addressing root causes cannot be seen as anything more than cutting the strings that connect the puppeteer to the puppet. Without engaging with the fundamental problem, the effects will continue through other routes and in other forms.

As addressing false root causes is a somewhat limited approach, the CESCR's focus on them is concerning. However, by comparison with the previous level of deference to others' agendas, even this limited type of action on false root causes stretches the Committee into new tactics. Most commonly such action takes the form of exhortations towards States and international organisations to take 'action' or make 'efforts' towards the resolution of a structural issue. In this sense the CESCR goes beyond a purely passive role and becomes a more normative actor. Yet even in this role, the CESCR's repertoire is frustratingly limited. Perhaps stemming from a reluctance to provide a substantive and substantial analysis of

[99] Summarised by Marks as those 'roots' where, '[i]n the first place, the investigation of causes is halted too soon. Secondly, effects are treated as though they were causes. And thirdly, causes are identified, only to be set aside'; Marks (n 27) 70.

relevant structural issues, the 'actions' and 'efforts' encouraged by the Committee tend to remain undefined or be self-evidently inadequate.

Examples of this encouraging but limited analysis are visible in the CESCR's statement on the 'Rio+20 Conference' where the Committee notes a range of necessary actions, but is limited in its ambition, failing to address the structural roots of the problem.[100] General Comment 12, although a significant development in many senses, is guilty of the same limitation when it vaguely requires of States that they 'ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end'.[101] While new instruments may indeed be necessary, in offering such a vague solution the CESCR undermines the pursuit of a more systemic solution to the problems faced.

It is notable that these first three types of engagement – application, deference, encouragement – are structural only in the sense that the actions have some (minimal) potential or hope of addressing structural issues. It is further noteworthy that the vast majority of the activities of the CESCR can be categorised into one of these three limited types of action. This limitation has been highlighted by critics of human rights approaches who note the severe deficiency of such actions.[102] However, reform proposals that are entirely sympathetic to the strategic and institutional approach of the human rights treaty bodies have also echoed these concerns.[103]

5.3.4. Level Four

Engagement with the largest and most complex of economic, social and cultural challenges is most substantially addressed by the final types of engagement (number 4). The type of actions that might be taken under this heading might involve expansive analysis with tangible and significant consequences. In essence the work of the Committee at this level should be aiming to construct a range of analyses, strategies and actions that can reach the structural cause of downstream harms to human rights enjoyment.

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[100] CESCR, *Statement in the Context of the Rio+20 Conference on 'the Green Economy in the Context of Sustainable Development and Poverty Eradication'* (UN Doc E/C12/2012/1 2012).

[101] CESCR, *General Comment 12: The Right to Adequate Food (Art 11 of the Covenant)* (UN Doc E/C12/1999/5 1999) para 36.

[102] See, eg, Marks (n 27).

[103] The outcome document of the Dublin II process for strengthening the treaty bodies noted inter alia that, '[r]ecommendations that call for structural change … should be made systematically'; Outcome Document, *Strengthening the United Nations Human Rights Treaty Body System (Dublin II Meeting)* (2011) para 71 <http://www.ishr.ch/sites/default/files/article/files/DublinII_Outcome_Document.pdf> accessed 20 September 2016.

In this area there are few examples of CESCR involvement. However, the Committee's statement on Globalisation (from 1999) is perhaps the best illustration of the type of action that is needed. In that statement the CESCR takes a conceptual approach to the issue of globalisation, rooting its analysis in the standards of the ICESCR (without being constrained by them), and identifying negative trends.[104] The content of this Statement leads to the Committee to bluntly note that:

> [c]ompetitiveness, efficiency and economic rationalism must not be permitted to become the primary or exclusive criteria for developing policy.[105]

However, the CESCR also provides examples of how globalisation can affect individual rights such as the right to form a trade union, education, social security and health.[106] Importantly however, the CESCR's framing is successful at addressing the issue in balanced manner and illustrating positives to globalisation where they exist.[107]

It is clear that dealing substantively with issues such as globalisation poses much more complex dilemmas for the CESCR. It perhaps brings the body into areas where its members' collective expertise is less well-developed, and has potential to demand greater resources as the Committee members study and negotiate substantial actions. However, a statement such as the one on globalisation is significantly more valuable than many of the other efforts by the Committee to merely restate that there are connections between a phenomenon and the ICESCR without explicating that connection.

The above analysis provides some illustrative examples of the CESCR's engagement with structural issues. In doing so it points to the areas where the Committee has been least active in its interventions. It suggested that the Committee has engaged with structural issues cautiously, and to a limited extent through its application of Covenant norms, through its deference to existing processes and through its encouragement of 'action'. On the other hand, the more substantial types of structural engagement identified above are rarely seen in the Committee's work.

5.4. The Necessity of Structural Engagement

This failure to appropriately engage with structural issues on a deeper level, it will be argued below, is a problem for the CESCR. It limits the Committee's voice on a range of issues, it

[104] CESCR, *Globalization and Economic, Social and Cultural Rights* (UN Doc E/C12/1998/26 1998).

[105] ibid para 4.

[106] ibid para 3.

[107] ibid.

does an injustice to those who rely on its actions, and without reform it is likely to reduce the relevance of the ICESCR's provisions.

More significant, however, is the harm that the current approach does to the substantive goals of the Covenant. The foundations of the multi-layer typology described above are in a literature that is (deeply) critical of the approach taken by the international human rights movement.[108] It has become a well-worn critique of 'human rights'[109] to note an institutional aversion to considering the structural roots of a problem. While the previous section suggested that full engagement with structural issues may in practice be avoided in the CESCR's work, it is far from clear that this is a problem of institutional design. As such, the remaining discussion of this chapter focusses on two issues: why is structural engagement important; and how might the CESCR improve at it?

These are important issues for the (re)constructed version of retrogression. It must be able to take on progressively greater, more effective roles in these areas if it is to be able to address structural issues satisfactorily.

5.4.1. Voice, Relevance, and Individual Justice

The Committee's tendency to delegate consideration of structural issues to other international institutions or processes has a range of potential mid-term negative effects. The first of these is the harm that might result to the 'voice' of the Committee. If a trend develops of the CESCR contentedly agreeing with outside bodies on a range of matters, it is likely that over time the views of those bodies will be sought directly more often. Thus, for example, if the CESCR has fully accepted the Paris Principles on NHRIs and has not itself added to those standards, it becomes likely that the views and leadership of a more active body are sought.[110] Of course there is a balance to be struck. The CESCR cannot (and should not) take the lead in all matters remotely related to human rights. However, there will be issues such as development or neoliberalism where it is crucial for the promotion of the ICESCR that the CESCR has a strong and distinct voice.

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[108] Marks (n 27); Anne Orford, 'Contesting Globalization: A Feminist Perspective on the Future of Human Rights' (1998) 8 Transnational Law & Contemporary Problems 171; David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2005).

[109] Although it is worth highlighting that a majority of the critiques are directed the idea of human rights, rather than at a particular manifestation of them. Occasionally this framing results in the author critiquing what they see to be problems of human rights, but which are not found in human rights documents. See, eg, Slavoj Žižek, 'Against Human Rights' (2005) 34 New Left Review 115, especially 129.

[110] In this case, perhaps the International Coordinating Committee for NHRIs.

A connected concern relates to the general relevance of the ICESCR to rights-related discussions. Absent a full engagement with those structural issues that affect rights most severely, it is possible that the ICESCR system will slip into a state of limited relevance. If the Covenant and the Committee fail to address issues which threaten catastrophic damage to the enjoyment of ESR – such as environmental harm or economic instability – then the ICESCR system will surely be side-lined. It must be a possibility that those organisations and individuals with an interest in ESR would take their advocacy to another international or regional body, or to the national level. While predictions of the ICESCR's irrelevance might seem exaggerated, when seen in the context of the CESCR's weak response to the 2007/8 crises it is less difficult to imagine advocacy groups moving away from the body as a forum for holding States accountable.

The final feature of the CESCR's limited approach to structural engagement is the negative impact it can have upon those individuals that rely upon it. If individuals or groups rely upon the ICESCR system to vindicate their ESR, when the Committee fails to engage with structural issues and move towards resolving those issues it does rights holders a disservice. Without true structural engagement the ICESCR approaches the status of a sort of disingenuous promise; holding out the prospect of ESR for all without having, in a structural context, a realistic strategy for their achievement.

5.4.2. Structural change

Yet in a significant sense, these three 'challenges' can be seen as peripheral problems of form or presentation when counter-posed to the more significant problem that the CESCR's approach poses for achieving the substantive goals of the ICESCR. It is this aspect that makes clear the importance of the CESCR engaging more fully and more directly with structural issues.

One of the key facets of an approach that fails to recognise the structural scale of issues, is the narrowness of the solutions offered. In Marks' terms; the 'under-diagnosis of the problem leads to insufficiently broad responses'.[111] This focus might be a function of human rights systems' tendency to focus heavily on those issues for which there is a clearly identifiable remedial solution.[112] Yet, while this focus on remedial solutions might offer short term or small scale relief for rights-holders (as in the case of the Optional Protocol system discussed above), it falls well short of offering structural change.

[111] Marks (n 27) 70–71.

[112] ibid 71.

While it is possible to argue for the CESCR to limit itself to such definite and achievable solutions (and indeed its current resource and expertise capacities suggest that this may be its functional limit), there is a clear disjuncture between the ambition of the ICESCR and this position. Generally, ESR 'pose a more significant challenge to the premises of possessive individualism underlying globalization'.[113] Specifically, the ICESCR, in addition to the full realisation of a range of ESR, promises engagement with complex issues of resources,[114] international cooperation,[115] equality,[116] and individual economic freedoms.[117] These promises further implicate the issues of environmental sustainability, development, economic stability, and the navigation of socio-cultural contexts. The magnitude of these issues is not compatible with short term or small scale solutions. This, then, leaves two possible routes forward. Either it can be conceded that the CESCR cannot or should not engage with the scale of the challenge posed by the ICESCR. Or, alternatively, it can be acknowledged that a more expansive engagement with the scale of those challenges is needed.

This dilemma is further complicated by critical resistance to human rights bodies such as the CESCR taking up such an engagement.[118] Critical voices are likely to demand that the CESCR reimagines its position, image and theory of itself as it takes up greater engagement with complex, balanced and structural issues. A primary concern voiced in this regard is that engaging with the detail of policy represents a juxtaposition with the concept of 'rights'.[119] Thus, it has been argued that '[t]he language of "rights" contrasts with that of "management" and suggests that there must be some limit to the weighing of costs and benefits…'.[120] In other words, whereas rights have previously been invoked as a trump card,[121] their use on one side (or both sides[122]) of a finely balanced issue denatures their special appeal. Yet, it is also important that the human rights framework 'is sufficiently subtle' so as to allow a range of actors to be held accountable in a range of situations.[123] It is therefore a difficulty for bodies such as the CESCR to recognise that even as their consideration

[113] Orford (n 107) 189.

[114] *International Covenant on Economic, Social and Cultural Rights* (n 3) art 2(1).

[115] ibid.

[116] ibid art 2(2).

[117] ibid art 6.

[118] Generally, see Golder who notes that, 'critical work is expended on reworking and reinscribing the ideal of human rights (rather than, for example, displacing, overcoming or transcending it)'; Ben Golder, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought' (2014) 2(1) London Review of International Law 77, 3.

[119] Sundhya Pahuja, 'Rights as Regulation: The Integration of Development and Human Rights' in Bronwen Morgan (ed), *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship* (Ashgate Publishing, Ltd 2013) 190.

[120] Koskenniemi (n 12) 48–49. See also Pahuja (n 118) 181–191.

[121] Ronald Dworkin, 'Rights as Trumps' in Aileen Kavanagh and John Oberdiek (eds), *Arguing About Law* (Routledge 2013); Philip Alston, 'The Nature of International Human Rights Discourse: The Case of the "New" Human Rights', *Conference on an Interdisciplinary Inquiry into the Content and Value of the So-Called 'New Human Rights'* (Oxford 1987) 2.

[122] Koskenniemi (n 12) 50.

[123] Orford (n 107) 196.

becomes more nuanced and ambitious, rights' 'natural place must be outside politics', or at least outside of a certain kind of institutionalised politics, and 'yet constraining politics'.[124]

Beyond simply producing an inadequate scale of response, the CESCR also crucially misses its most important target when it fails to focus on structural issues. When it fails to directly address the largest of structural issues in a sustained manner, the CESCR allows patterns of structural reproduction to continue. Systems which maintain inequality, economic injustices or which promote environmental harms are adept at reproducing themselves.[125] This calls for the issues to be addressed in a sustained manner. A short burst of attention to globalisation, in a CESCR statement for example,[126] will not pose any challenge to the continuation or expansion of the harms of that system. Nor is a disjointed and delayed response, such as that offered to austerity capable of challenging entrenched phenomena.

By leaving systemic issues unaddressed and only addressing the more small-scale and concrete dimensions of an issue the Committee leaves an important part of the problem untouched. The relationship between the systemic and the various effects might be characterised as treating the symptoms of a disease while leaving the disease itself to continue. Thus, at the very least, the CESCR's current approach leaves a 'gap' in its consideration of the issues affecting the Covenant. At its worst, the CESCR is ignoring the real problems faced.

The task of addressing more satisfactorily the structural issues that affect ESR is undoubtedly an imposing one, fraught with practical, political and conceptual challenges. In one example in the context of a feminist critique of certain tenets of capitalism, Lee writes, '[w]hile it is simple to frame laws to charge husbands who abuse their wives, it is not as simple to deal with the economic violence of capitalism'.[127] However, it is clear that concerted engagement with these issues is central to a good faith attempt at pursuing the ICESCR's promise. Neither, despite the difficulties, are the promises of the ICESCR unattainable. In a bid to overcome 'a feeling of hopelessness and passivity', Orford notes

[124] Başak Cali and Saladin Meckled-García, 'Human Rights Legalized' in Başak Cali and Saladin Meckled-García (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Psychology Press 2006) 4.

[125] Rob White, 'Environmental Harm and the Political Economy of Consumption' (2002) 29 Social Justice 82, 98.

[126] CESCR, *Globalization and Economic, Social and Cultural Rights* (n 103).

[127] Yumi Lee, 'Violence against Women: Reflections on the Past and Strategies for the Future - An NGO Perspective' (1997) 19 Adelaide Law Review 45, 50.

that '[i]t is not possible to imagine alternatives…when critics are complicit in representing [the status quo] as all-powerful'.[128]

5.5. Improving Structural Engagement

How then can structural engagement be improved? What role does retrogression have to play in this improvement? And, specifically, how can the (re)constructed version of retrogression contribute to such advances? Stress testing the ability of the (re)construction to engage with structural issues is an important goal of the section. It is clear that a reformed doctrine cannot be a silver bullet, however. Acknowledging this, the places where broader reforms are needed are also discussed.

While, in the current research, the potential changes to retrogression are the core concern, there are a range of other reforms that could improve the dialogue between ESR and structural issues. Addressed first below are the doctrinal changes to non-retrogression, following which some broader institutional reforms are discussed.

5.5.1. Changes to Non-Retrogression

The (re)constructed doctrine permits improved structural engagement through a number of key phrases.[129] The first of these phrases ('action, inaction or contribution to a trend') expands the range of behaviours that States can be held accountable for under the doctrine. This is intended to combat the sort of engagement with structural issues that identifies false 'root causes' (level three of the typology developed above). This frees the CESCR to focus on the real magnitude of the issue, in the knowledge that subsequently finding the link back to a responsible State is easier. It means that the Committee is not forced to 'stop short' and discuss false root causes for fear of losing the link to accountability.

Further, in its focus on 'trends' the (re)constructed doctrine aims to address the nature of structural issues more comfortably. Very large structural issues will be seen in outline before their effects can be seen in concrete State policies or ESR violations. The recent wave of austerity provides one example of where State contributions to rhetoric preceded policy manifestations which themselves took some time before appearing in provable ESR violations. It was clear in some contexts long before individuals could evidence the impacts upon them, that the socio-economic interests, especially of the already disadvantaged, were

[128] Orford (n 107) 194 (footnote omitted).

[129] The full (re)construction read; 'a retrogressive measure [is] defined as an action, inaction or contribution to a trend which is likely to negatively affect the progressive realisation of individuals' ICESCR right'. Chapter 4, p118.

to be de-prioritised. Allowing the CESCR to act on the basis of rigorous projections and critique austerity before it took hold in policy or real world effects, would have speeded its response and increased the effect of its interventions. It would mean that fewer individuals would have to suffer the effects of retrogressive measures and for a shorter period of time, before the measures were opposed by the Committee.

The second change which facilitates the deeper structural engagement detailed in level four above is the phrase, 'negatively affect the progressive realisation'. This is different to some current understandings of retrogression insofar as it does not only prohibit reversals in ESR standards (backwards steps) but rather prohibits any damage to progress that is being made. Again, this empowers the CESCR to intervene at an earlier stage when indications of the negative effects of a structural issue arise, but before the reductions in ESR enjoyment begin to be felt by individuals. It is also a more logically sound approach. If it can be seen from a period of stagnating results that a policy is not working, it makes little sense – in the context of the ICESCR's demand for progress – to hold off considering the measure until it is actively harming individuals.

Together with these specific doctrinal changes, the simpler formulation of the doctrine also facilitates its more frequent use. Rather than up to thirteen criteria that are to be assessed under current versions of the doctrine, the (re)constructed formulation asks a simple question; is the activity under consideration likely to negatively affect the progressive realisation? In the context of a CESCR under time and resource pressures, such simplicity allows the CESCR to interrogate retrogression more often and make more findings of it. This is essential. One of the major problems with the current versions of retrogression has been their underuse in the face of severe situations. Retrogression or approximations of it have been invoked just 15 times in the CESCR's Concluding Observations (in addition to 19 mentions of the Letter to States).[130] The simplification of the terms of the doctrine could enable to Committee to engage with it more often in relation to challenging structural issues.

[130] In the CESCR's 'Report on the Sixth Session' (1992) UN Doc E/1992/23 para 219 (Concluding Observations on Finland); 'Report on the Seventh Session' (1993) UN Doc E/1993/22 para 152 (Concluding Observations on Hungary); 'Report on the Tenth and Eleventh Sessions' UN Doc E/1995/22 para 181 (Concluding Observations on Mauritius); ibid para 352 (Concluding Observations on Mali); 'Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions' UN Doc E/2001/22 para 381 (Concluding Observations on Australia); 'Report on the Thirty-Second and Thirty-Third Sessions' UN Doc E/2005/22(SUPP) para 582 (Concluding Observations on Chile); 'Report on the Thirty-Sixth and Thirty-Seventh Sessions' UN Doc E/2007/22 para 190 (Concluding Observations on Canada); 'Report on the Forty-Second Session' UN Doc E/2010/22 para 260 (Concluding Observations on the United Kingdom); 'Report on the Forty-Fourth and Forty-Fifth Sessions' (2011) UN Doc E/2011/22 para 157 (Concluding Observations on Colombia); 'Report on the Forty-Sixth and Forty-Seventh Sessions' UN Doc E/2012/22 para 95 (Concluding Observations on Germany); 'Report on the Forty-Eighth and Forty-Ninth Sessions' UN Doc E/2013/22 para 17 (Concluding Observations on New Zealand); ibid para 11 (Concluding Observations on Bulgaria); ibid paras 12, 28 (Concluding Observations on Spain); *Concluding Observations: Japan* (UN Doc E/C12/JPN/CO/3 2013) para 9; *Concluding Observations: Egypt* (UN Doc E/C12/EGY/CO/2-4 2013) paras 6, 18.21/03/2017 08:13:00

5.5.2. *Institutional Factors*

However, as is apparent from the previous sections, a doctrinal adjustment alone would be inadequate. A CESCR with greater resources, broader expertise and more ambition is required. The Committee and its supporting staff must have the capacity to respond with speed to global developments, and to engage – in depth – with ongoing structural issues. How best to build such capacity within the political and institutional constraints of the UN, is a matter for other research.[131] However, reform proposals must go beyond efficiency concerns and demonstrate how any revised committee arrangement would be better equipped to assert influence over structural changes that affect rights.

One element of such reform might involve the treaty bodies working together on structural issues and including the insights of the special mandate holders to a greater extent. Phenomena such as global warming or economic dysfunction do not simply affect the ICESCR rights, but can have impacts upon the full range of human rights treaties. In such scenarios, a coordinated response makes more sense than a narrower focus on ESR only. The response is also likely to be better, with the greater texture and weight that the combined expertise and perspectives of the various committees and rapporteurs can bring.

Another strategy might be greater co-working with non-human rights bodies. It is undoubtedly true that the site of the most pivotal decisions that shape the response to structural issues is not the CESCR. While this continues to be the case, the CESCR engaging and discussing structural issues with influential international organisations provides a way of ensuring the inclusion of ESR thinking. However, many of the issues with this approach that were outlined above remain relevant, including the possible cost to the distinctiveness of the CESCR's voice. It is crucial that the CESCR guards jealously its unique perspective on socio-economic issues.

Indeed, beyond simply being a way of the CESCR implanting its own approaches into influential organisations, working closely with them offers opportunities to improve its responses, and to learn from the work of those well-resourced organisations.

[131] See, for example, Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System' (United Nations Human Rights Office of the High Commissioner 2012); Michael O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10(2) Human Rights Law Review 319.

5.6. Conclusions

One of the significant innovations in the (re)constructed doctrine of non-retrogression is its capacity to improve the CESCR's response to structural issues. This chapter set out to demonstrate why, and in what respects, the Committee was currently failing to address those macro-scale issues and then to provide an account of how a reformed doctrine of non-retrogression might help.

The chapter began by offering an assessment of why structural engagement posed a particular challenge for the ICESCR. It laid much of the blame at the foot of the progressive realisation obligation which fails to speak to high-level policy making in a coherent manner. In particular, the requirements placed upon States when devising and implementing a wide-ranging social policy are poorly delineated.

To demonstrate the effects of this weakness, the chapter broke into four levels, the types of structural engagement that are required. At the one end, the CESCR was seen to be relatively successful in its application of existing doctrine to well-defined situations. The body is also competent when it comes to offering some engagement with existing agendas or in identifying potential causes for the under-fulfilment of ESR. The difficulty came with the CESCR's capacity to link apparent 'causes' to their underlying structural determinants or to offer any real diagnosis or discussion of those structural issues. In this larger, more challenging task the CESCR's performance was poor.

Having argued that the progressive realisation obligation was an impediment to structural engagement, and having shown some the CESCR's difficulties with such engagement, the chapter collected some of the ways in which structural engagement is crucial. It was argued that the distinctiveness, relevance, and ability to provide individual justice all hinged upon the CESCR's ability to engage with structural issues. Further, it was argued that the capacity to enact change was also linked to its ability in this area.

Finally, the chapter turned to bring together the ways in which the (re)constructed doctrine and other institutional reforms might address the CESCR's weaknesses in this area. Of the doctrinal changes, the freedoms to interrogate larger issues that the CESCR gained from the changed wording were noted as the most significant. Particularly, the changes to the doctrine encourage the CESCR to assess a broader range of State actions and inactions and to look for earlier effects upon progressive realisation. The simplification of the doctrine

was also suggested as being helpful in increasing the frequency with which the doctrine was seen in Concluding Observations.

As a whole the chapter identified the difficulties with relying upon the ICESCR's progressive realisation obligation to achieve full structural engagement, and it posited changes to retrogression as a solution to those problems. On its own the addressing of structural issues would not properly fulfil retrogression's assigned purpose. However, when combined with the reformed doctrine's attention to crises, micro groups, and the practicalities of monitoring, it is an important starting point. The following chapters take up this work and continue the stress testing of the (re)constructed doctrine.

Chapter 6

Resilience in Crises

6.1. Introduction

A subcategory of the type of structural threats discussed in the previous chapter are those events marked by the characteristics of 'crisis'.[1] Crisis situations add pressure to the handling of an issue and the legal flexibility that is often offered to those tasked with responding to the crisis has posed a particular challenge to the operation of the doctrine of non-retrogression. Non-retrogression, in the absence of a derogations clause in the ICESCR, is the sole crisis-orientated flexibility that States can avail of. Yet, despite this, the doctrine has traditionally offered very little margin for emergency State responses. In the Committee's words, 'it is precisely in situations of crisis, that the Covenant requires the protection and promotion of all economic, social and cultural rights'.[2]

This puts the doctrine of non-retrogression on something of a collision course with the normally flexible responses to crisis situations. On the one hand, the doctrine seeks to tightly regulate the options for States in crises. On the other, crises are frequently used by those holding power to claim greater flexibility and fewer constraints upon their actions. This collision appears to have resulted weakening of the doctrine of non-retrogression in the most recent financial and economic crises. The previously stringent controls that the doctrine imposed upon States were downgraded in the CESCR's 'Letter to States'[3] resulting in a significantly greater degree of flexibility for those responding to the crises.

The (re)constructed version of retrogression offers opportunities to revisit the vulnerability of the doctrine to crisis situations. In particular, its simplicity might mitigate the type of rewriting of the doctrine's criteria that took place. However, a (re)construction would lose some of the stability that is currently seen in the doctrine of non-retrogression, and might

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[1] The terms 'emergency' and 'crisis' are used interchangeably here to reflect their general interchangeability in scholarship and public discourse (eg the economic 'crisis' of recent years has also been referred to as an economic 'emergency'). This usage is notwithstanding that it may be useful to invoke one or other term for a specific purpose (eg for legal claims, the term 'emergency' may have greater purchase).

[2] CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions' (2011) UN Doc E/2011/22 para 150. The CESCR has also endorsed this line of reasoning in *General Comment 2: International Technical Assistance Measures (Art. 22 of the Covenant)* (UN Doc E/1990/23 1990) para 9; and to a lesser extent in *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) paras 11–12. For an academic adoption of this perspective see, eg, Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-International Armed Conflicts* (Martinus Nijhoff Publishers 2013) 139.

[3] Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW.

therefore be less resilient to crisis impacts. A close analysis of the doctrine's operation in crises is therefore essential.

This chapter addresses the doctrine's resilience. It situates the issue within the context of the institutional pressures upon the CESCR, and shows how the current doctrine of non-retrogression was impacted by the crises. It demonstrates the problems with the changes made to the doctrine and looks towards how the (re)constructed version of non-retrogression might offer greater resilience. The chapter concludes by arguing that the severity of the impacts upon retrogression might be mitigated through a combination of in-built flexibility and a strongly defined guiding purpose.

6.2. A Committee Under Pressure

An acknowledgement of the context in which the Committee was operating and the events which it was (meant to be) responding to, is helpful to understanding its use of the doctrine of non-retrogression. As has been well explored, the global financial crisis was no less than a disaster for human rights.[4] However, for the Committee, it can also be described as an existential moment. Although there had been economic crises before,[5] there was also greater global attention to the 2007/8 crisis.[6] In addition to this, by 2007 the CESCR was a well-established body that had just reached its 20th anniversary. It was therefore reasonable to expect a robust response from the Committee. Members of the Committee showed moments of awareness of the gravity of the crisis and its implications for the Covenant. Gomes, for example, noted in a CESCR session:

> [the ICESCR's] implementation in the future would face two major difficulties: the consequences of the current financial crisis; and the need to consider the economic, social and cultural rights of the most vulnerable and excluded groups in the design of global trade policies.[7]

Although the CESCR might have been attuned to the importance of its role, the nature of that role seems to have been harder to identify. In addition to the attention the crises garnered, there was also significant political division and sensitivity surrounding

[4] Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 23–24; Aoife Nolan, 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) 4 European Human Rights Law Review 360, 361–363; see generally, Aoife Nolan, 'Introduction' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 1–5.

[5] Aoife Nolan, Nicholas J Lusiani and Christian Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 126.

[6] No doubt in part due to the countries that were affected; Bob Jessop, 'Narratives of Crisis and Crisis Response: Perspectives from North and South' in P Utting and others (eds), *The Global Crisis and Transformative Social Change* (Springer 2012) 23.

[7] CESCR, *Summary Record of the Second Part (Public) of the 50th Meeting (18th Nov 2008)* (UN Doc E/C12/2008/SR50 2009) para 10.

governments' responses to them. This inevitably put the CESCR in a difficult position and it is likely to have contributed to its early paralysis on the issue. As Nolan argues, the CESCR's longstanding position that compliance with the Covenant does not necessitate a particular economic system need not have limited the Committee from fully discussing the 'parameters and impacts of economic decision-making'.[8] However, in the sensitivity of the context it is easy to see how the CESCR might have had anxieties about doing so.

This anxiety can be seen to manifest itself in a number of ways. The CESCR seems to have been paralyzed for much of the crises. Between the brief attention given to the crises at its forty-first session (in November 2008) and the release of its letter at its forty-eighth session (in May 2012) there is no discussion of the appropriate response of the CESCR recorded in its Summary Records or Annual Reports.[9] After this long period of delay the CESCR's letter became the main point of normative reference for the crises and austerity.[10] However, a further statement was released much later in 2016 on *Public Debt, Austerity Measures and the ICESCR*.[11] It is unclear what the purpose or reasoning behind this second statement was, however, its release provides some indication of the incubation period of the CESCR's full response (around eight years).

Such delays might be explained away as resulting from a time-pressured Committee that had prioritized country examinations.[12] However, such a conclusion does not sit easily alongside other CESCR discussions. In its brief (and only officially recorded) discussion of the crises prior to the Letter, the CESCR showed no such pessimism about its available time and decided that it would produce a statement very quickly by the forty-second session.[13] Indeed, the then High Commissioner for Human Rights was informed that the CESCR 'was *about* to publish a statement'.[14] Committee member Mr Sa'di was also of the view that drafting a statement on the crises should not take a long time.[15] The same member also

[8] Nolan, 'Not Fit for Purpose?' (n 3) 371.

[9] Except for a repetition at the *forty third* session of a promise to release a Statement on the financial crisis at the *forty-second* session; CESCR, 'Report on the Forty-Third Session' (2010) UN Doc E/2010/22 para 556.

[10] See, for example, references to the Letter in; CESCR, *Concluding Observations: Slovenia* (UN Doc E/C12/SVN/CO/2 2014) para 8; CESCR, *Concluding Observations: Romania* (UN Doc E/C12/ROU/CO/3-5 2014) para 15; CESCR, *Concluding Observations: Portugal* (UN Doc E/C12/PRT/CO/4 2014) para 6; CESCR, *Concluding Observations: Czech Republic* (UN Doc E/C12/CZE/CO/2 2014) para 14; CESCR, *Concluding Observations: Ukraine* (UN Doc E/C12/UKR/CO/6 2014) para 5; CESCR, *Concluding Observations: Japan* (UN Doc E/C12/JPN/CO/3 2013) para 9; CESCR, *Concluding Observations: Bulgaria* (UN Doc E/C12/BGR/CO/4-5 2012) para 11; CESCR, *Concluding Observations: Iceland* (UN Doc E/C12/ISL/CO/4 2012) para 6; CESCR, *Concluding Observations: Spain* (UN Doc E/C12/ESP/CO/5 2012) para 8; CESCR, *Concluding Observations: New Zealand* (UN Doc E/C12/NZL/CO/3 2012) para 17.

[11] CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (UN Doc E/C12/2016/1 2016).

[12] Bras Gomes made such an argument during the CESCR's discussions; CESCR, *Summary Record of the First Part (Public) of the 27th Meeting (3rd Nov 2008)* (UN Doc E/C12/2008/SR27 2008) para 11.

[13] CESCR, 'Report on the Forty-Third Session' (n 7) para 556.

[14] CESCR, *Summary Record of the Second Part (Public) of the 50th Meeting (18th Nov 2008)* (n 5) para 11 (emphasis added).

[15] ibid para 13.

found time to debate whether the crisis was a financial or an economic one.[16] Another Committee member used the CESCR's brief discussion of the crisis to raise the issue of how the crisis had affected the US dollar, and thus his own travel allowances.[17] Given the range of issues that the CESCR felt able to discuss in this context, and its initial plan to publish a statement by its next session, it is unlikely that time constraints alone prevented the CESCR from engaging with the crisis.

Rather, for the Committee the crisis can be characterised as providing a restrictive context. The opportunities for normative development were limited by political sensitivities, as well as some degree of resource and time constraints. These institutional pressures during the crises demonstrate the need for a strong, clear, and resilient normative framework to be developed in advance of crises so as to enable the straightforward application of the ICESCR's norms. Unfortunately, the doctrine of non-retrogression did not provide such clarity and resilience. This, it is argued below, enabled the hollowing out of the obligation at the very time that it mattered most.

6.3. Changes to Retrogression in the Crises

There was a marked change in how the ICESCR dealt with retrogression during the most recent crises. Its Letter, as well as being its primary response to the crises, moved away from the CESCR's traditional position on crises. The CESCR's earlier approach afforded States a range of everyday flexibilities in protecting Covenant rights, but did not permit them exceptional powers or the authority to substantially weaken rights protection in times of crisis. It is arguable that the Letter to States changed that pattern, endorsing a new level of emergency flexibility for the implementation of obligations. This amounts to a near-suspension of the doctrine of non-retrogression.

6.3.1. Pre-2012 Approach to Retrogression and Crises

Taken as a whole, the ICESCR has not traditionally supported deviations from Covenant obligations that are rationalised as 'emergency' responses[18] and it contains no provision allowing for derogations.[19] Instead, flexibilities are afforded through article 2(1)[20] and article

[16] ibid.

[17] ibid para 15.

[18] Diane A Desierto, 'ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises' (2012) 44 George Washington International Law Review 473, 493.

[19] M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 281 (fn 132), 293. Indeed there was no specific discussion of such a provision during the drafting process; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International

4, and additionally through the use of less prescriptive substantive articles. The most significant of these flexibilities – article 4 – allows States to enact 'limitations' but, crucially, does not frame such measures as 'emergency' ones.

The distinction between derogations and limitations is not an exact one, but there are several differences of 'character and scope'.[21] For example, derogation provisions are subject to a threshold condition, meaning there must usually be a 'time of public emergency' before the reduction of rights protections can be contemplated.[22] This is not the case with limitations, which can be enacted at any time including in situations of 'normality'. There are additional differences in the scope of the potential interference(s) with rights. With derogations regimes, the restraining factors on action tend to be the 'exigencies of the situation', 'other obligations under international law' and the requirement of non-discrimination.[23] In the context of limitations, however, requirements of legality, compatibility with the 'nature' of the rights and the promotion of the 'general welfare of society' restrain the potential rights-interfering actions.[24]

In essence, the purpose of article 4 ICESCR is to accommodate balances between (or the 'harmonisation' of[25]) various rights, and between rights and 'the legitimate interests of the community',[26] and thus to pragmatically resolve tensions within the Covenant itself.[27] In taking such an approach, the ICESCR accommodates situations in which different rights come into conflict with each other or cannot be fully realised in tandem. The Covenant scheme, does not however, allow for a departure from those rights for reasons that are not 'compatible with the nature of [the] rights'.[28]

Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 217; 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) UN Doc E/CN.4/1987/17 paras 46–56.

[20] Sandra Liebenberg, 'The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa' (2001) 17 South African Journal on Human Rights 232, 252; Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) Human Rights Quarterly 81, 94.

[21] Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review 557, 654.

[22] See, for example, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) art 4.

[23] ibid article 4.

[24] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) art 4.

[25] Alston and Quinn (n 28) 194.

[26] ibid.

[27] CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 28. See also Sepúlveda (n 17) 278.

[28] *International Covenant on Economic, Social and Cultural Rights* (n 22) art 4. Sepúlveda suggests the synonym 'essence' here to imply that measures should not be contrary to the 'essence' of the Covenant rights; Sepúlveda (n 17) 281.

The use of limitations, rather than derogations, is indicative of the ICESCR's overall approach to emergency management. Through prohibiting derogations, the ICESCR denies the need for exceptional responses to emergency situations. This approach places emergency responses within the 'ordinary' scope of application of the ICESCR and does not allow for exceptional emergency responses to situations that threaten security or order.[29] As such, it has been argued that 'the Covenant fully applies in emergency situations'.[30] The CESCR has even made this point in relation to programmes of austerity in the past, saying that it:

> recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become *more, rather than less, urgent*.[31]

This 'more, and not less, important' approach is often justified by highlighting that the nature of socio-economic rights (requiring access to food, healthcare, work etc.) makes them especially valuable to individuals in an emergency.[32] This approach to emergency is important to understanding the degree to which the CESCR modified its scheme of obligations when dealing with the financial and economic crises.

The pattern of allowing everyday flexibility but barring exceptional or emergency responses is reflected in the doctrine of non-retrogression. As was noted earlier, the most lengthy statement of the doctrine is in the General Comment on the right to social security.[33] There, the CESCR required States that wished to take a retrogressive step to prove that the measures are duly 'justified by reference to the totality of the [ICESCR] rights', and that the maximum available resources are being used.[34] In addition the CESCR noted that it:

> will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups … (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures …[35]

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[29] Alston and Quinn (n 17) 202. Except, as Sepúlveda notes, 'where such a situation is "genuinely synonymous" with general welfare of society'; Sepúlveda (n 17) 282.

[30] Sepúlveda (n 17) 296. See also CESCR, 'Statement on The World Summit for Social Development and the ICESCR' (UN Doc E/C12/1994/20 Annex V 1995) para 5; CESCR, *General Comment 3* (n 2) paras 11–12.

[31] CESCR, *General Comment 2* (n 2) para 9.

[32] CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions' (n 2) para 150. See further, Müller (n 2) 139.

[33] CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 42.

[34] ibid.

[35] ibid.

As such, the principle of non-retrogression in its pre-2012 form combined with the individual rights, article 4, and article 2(1), to provide significant flexibilities to States. Where States found themselves unable to progressively realise the rights, it was open to them to prove the need to take backwards steps. This everyday flexibility denied the need for derogations, special powers or the suspension of legal frameworks.

This helped to emphasise consistency of outcome. By refusing to subject ESR protections to the fluctuations of crisis situations, the importance of the rights is arguably underscored. Further, beyond simply emphasising the importance of the protection of the rights (a claim liable to being 'trumped' by something *even more* important, such as a crisis), this approach highlights the value of *consistent* protection. A final more pragmatic benefit of the approach that had generally been taken to retrogression prior to the Letter, is the maintenance of spaces for advocacy; if the obligations remain intact there remain avenues for contesting the State's approach.

6.3.2. Post-2012 Approach to Retrogression and Crises

This general picture of how the ICESCR previously dealt with emergencies underlines the significance of the (legal and/or rhetorical) move that the CESCR made with respect to retrogression. The Letter has already proved influential, having been cited by the Committee in Concluding Observations,[36] and its key innovations appearing in the CESCR's two most recent General Comments.[37] However, just how influential it proves to be in the medium to long term is at least partially dependent upon its legal status. The legality of the CESCR's outputs was discussed at length above,[38] and it was concluded – in brief – that the weight of all of the various Committee outputs hinged on the body's own authority as an interpreter of the Covenant. This puts much less weight on the exact form of the output (whether it is a Letter, General Comment or Statement).

If the Committee continues to stand behind its contents, the Letter has the potential to substantially shift the interpretation of the doctrine of non-retrogression – and perhaps consequently of the Covenant – towards greater flexibilities for States in crises. There are two primary indicators of this new more flexible direction; firstly, the fact that any change

[36] See note 10 above.

[37] CESCR, *General Comment 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)* (UN Doc E/C12/GC/22 2016) para 38; CESCR, *General Comment 23: The Right to Just and Favourable Conditions of Work (Art 7 of the Covenant)* (UN Doc E/C12/GC/23 2016) para 52.

[38] See Chapter 3, pp68-72.

in approach at all took place in the context of the financial and economic crises and secondly, the substance and character of the changes.

It is common for crisis situations and the rhetoric surrounding them to be used to ground claims for greater deference to those exercising power. [39] This is what has occurred in the CESCR's Letter to States. The letter formed the Committee's primary response to the financial and economic crises, and the CESCR used it to make substantial alterations to the doctrine of non-retrogression. In addition, the CESCR relies on rhetorical devices to show deference to States and to inflate the importance of (neo-liberal) market-based idea(l)s. For example, there is a flat acceptance that 'a lack of growth, impede[s] the progressive realisation of economic, social and cultural rights', and a reminder that States should '*avoid* at all times' denials of socio-economic rights.[40] This is weak phrasing that might be indicative of a cautious approach by the CESCR, and is language which has continued to be used since the Letter.[41] If there was anything in the uncertainty of a crisis that the CESCR could state with confidence it was that States 'should not' violate socio-economic rights.

Furthermore, this stands in stark contrast to the CESCR's previous practice of reminding States that socio-economic rights are more, and not less, important in times of national emergency.[42] At the same time, the CESCR's use of the term 'crisis' in the context of retrogression indicates, at the very least, a passive ingestion of that characterisation of the situation. Previously, the doctrine had generally appeared linked to 'everyday' situations of resource constraints and only less often in emergency contexts. The CESCR had encountered economic crises before, and had not demonstrated so much flexibility to national governments.[43] Such a rupture in the Committee's approach might plausibly be attributed to the (perceived) nature of the financial and economic crises as international, rapid, structural, and severe.

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[39] William E Scheuerman, 'The Economic State of Emergency' (1999) 21 Cardozo Law Review 1869, 1871.

[40] Chairperson of the CESCR (n 3) (emphasis added).

[41] The 'avoid' phrasing has since been repeated in CESCR, *General Comment 22* (n 36) para 38; CESCR, *General Comment 23* (n 36) para 52.

[42] CESCR, *General Comment 2* (n 2) para 9.

[43] The Committee merely; 'takes into account' (CESCR, *Concluding Observations: Solomon Islands* (UN Doc E/C12/1/Add33 1999) para 9) and 'acknowledges' (CESCR, *Concluding Observations: Mongolia* (UN Doc E/C12/1/Add47 2000) para 9) the effects of the Asian financial crisis; 'recognises' Togo's economic crisis (CESCR, *Concluding Observations: Togo* (UN Doc E/C12/1/Add61 2001) para 7); 'notes' the economic difficulties in Mexico (CESCR, *Concluding Observations: Mexico* (UN Doc E/C12/1/Add41 1999) para 12), Algeria (CESCR, *Concluding Observations: Algeria* (UN Doc E/C12/1995/17 1995) para 12) and Suriname (CESCR, *Concluding Observations: Suriname* (UN Doc E/C12/1995/6 1995) para 7). It additionally highlights the economic difficulties in Belarus and Cameroon, but appears to offer no flexibility to those States (CESCR, *Concluding Observations: Belarus* (UN Doc E/C12/1/Add7/Rev1 1996) para 10; CESCR, *Concluding Observations: Cameroon* (UN Doc E/C12/CMR/CO/2-3 2012) para 14).

The nature of the changes is also relevant; the substantive adjustments to non-retrogression display a clear emergency character. Prior to the 2012 Letter, States that wished to enact backwards steps were required to undertake multiple and relatively onerous measures. For example, in the context of social security, the Committee noted that before it might declare a retrogressive step 'permissible', it would examine some eight factors that required wide-ranging and independent review of the proposed measure. As noted above, this test included a requirement for participation, justifications, considerable review of the proposed measures and other precautions from the State.[44]

However, after 2012 a shift is discernible, with the Letter stipulating only four criteria that States must fulfil before taking a backwards step in the context of and economic crisis. This approach accommodates a greater range of State responses in emergency situations. Thus the Committee says that in order to be acceptable:

> first, the policy is a temporary measure covering only the period of the crisis; second, the policy is necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights; third, the policy is not discriminatory…; fourth, the policy identifies the minimum core content of rights…and ensures protection of this… .[45]

Yet two of these four criteria cannot even properly be described as conditions specific to the taking of retrogressive measures. While the inclusion of these conditions – that measures cannot be discriminatory, nor can they infringe the minimum core – is interesting in its own right, especially given the Letter's reference to social protection floors and the role of the International Labour Organisation,[46] these are general, longstanding and immediate[47] obligations that exist beyond the circumstances of retrogression.[48]

Thus, the specific non-retrogression test is reduced to two criteria; that policies are temporary, and that they are necessary and proportionate. The Letter to States notes that the first condition on 'any proposed policy change' is that the policy should be temporary. This is similar to the approach under the ICCPR,[49] the ECHR,[50] and the ACHR.[51] Apart from

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[44] CESCR, *General Comment 19* (n 32) para 42.

[45] Chairperson of the CESCR (n 3).

[46] Developed in CESCR, 'Social protection floors: an essential element of the right to social security and of the sustainable development goals' (UN Doc. E/C.12/2015/1, 2015).

[47] Bridgit Toebes, 'The Right to Health' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, M Nijhoff Publishers 2001) 176; Katarina Tomaševski, 'Indicators' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, M Nijhoff Publishers 2001) 532.

[48] Although non-discrimination and non-derogable standards are also hallmarks of emergency derogation clauses; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press 1994) 61–2, 63–6.

[49] *International Covenant on Civil and Political Rights* (n 20) art 4.

having proved problematic to enforce and define,[52] a condition of 'temporariness' denotes a period of exception to, or an aberration from, the more 'permanent' state of normality. Such a separation of exception (or emergency) from normality is fundamentally different to the approach that the ICESCR sets down. It endorses an 'emergency paradigm'[53] and departs from the Covenant's previous 'Business as Usual' approach to the non-retrogression doctrine by indicating that there is to be an exception to its 'usual' applicability. The requirement that policy changes that will affect ICESCR rights be 'necessary and proportionate' is also borrowed from the ICCPR, ECHR and ACHR emergency derogations regimes.[54]

The Letter's revised test for non-retrogression can be mapped onto the structure of the derogations clauses. Such provisions generally involve a dual-limbed test for determining the legality of a measure.[55] The first limb is a threshold test, asking if the requisite circumstances are present for derogation.[56] The second limb focuses on the substance of the measure introduced pursuant to the derogation. The contents of the letter take a similar approach. The first requirement is that there is a temporary economic and/or financial crisis, with elements of 'a lack of growth' and 'inevitable' adjustments to rights.[57] The second limb of the test then uses the 'necessary and proportionate' test to assess the substance of the measure.[58] Of course, while there are parallels between the Letter's derogation-style terminology and structure, and other international and regional human rights frameworks, there is nothing which binds the CESCR to previously established meanings of those terms.

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[50] *European Convention on Human Rights* (1950) art 15(1). Cf the ECtHR case of A v United Kingdom; Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP 2011) 200–202.

[51] *American Convention on Human Rights* (1969) art 27. Notwithstanding the similarities between the ACHR and ICCPR, many of the constitutions of South American countries set out separate regimes for a diverse range of emergencies, including economic emergencies; Gross and Ní Aoláin (n 7) 42; Brian Loveman, *The Constitution of Tyranny: Regimes of Exception in Spanish America* (University of Pittsburgh Press 1993) 25. See further Exception and Emergency Powers, Gabriel L Negretto and Jose Antonio Aguilar Rivera, 'Liberalism and Emergency Powers in Latin America: Reflections on Carl Scmitt and the Theory of Constitutional Dictatorship' (1999) 21 Cardozo Law Review 1797.

[52] Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764, 1782; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 171.

[53] Greene (n 51) 1765; Gross and Ní Aoláin (n 51) 174–5. Although these authors do not explicitly endorse this view.

[54] Human Rights Committee, *General Comment 29: States Of Emergency (Art 4)* (CCPR/C/21/Rev1/Add11 2001); *European Convention on Human Rights* (n 49) art 15(1); *American Convention on Human Rights* (n 50) art 27. All of these regimes require proportionality by reference to the 'exigencies of the situation'.

[55] Greene (n 51) 1766.

[56] ibid.

[57] Chairperson of the CESCR (n 3).

[58] ibid. The two other conditions listed there – the requirement of non-discrimination and respect for the minimum core of the rights – might be thought of as 'absolute' or non-derogable provisions.

There is also a distinctive 'emergency' character to the changes. The use of 'negative lists of exception' is a familiar feature of emergency governance.[59] By listing those elements of the ICESCR which should not be affected by the crisis (i.e. international cooperation, the protection of the core content of the rights, and non-discrimination), the Committee takes an approach to crisis regulation which is similar to that seen in some national constitutions[60] and in the non-derogable provisions of the ICCPR.[61] This legal method identifies 'key' values, either in the sense that they are 'fundamental' or that there is no clear reason for their infringement during a crisis.

Finally, the Letter to States sets 'law' and 'legality' aside in a manner entirely consistent with an emergency 'accommodation' approach. Thus the Letter argues that States should not deny or infringe rights, as '*[a]part from* being contrary to their obligations under the Covenant'[62] other negative effects such as political instability might arise. To a lesser degree the CESCR repeats this diversion from legality when it notes that the Covenant provides mere 'guideposts',[63] and notes that adjustments to socio-economic rights are 'at times inevitable'. [64] The CESCR's willingness to use legal obligations as a secondary value places States' obligations in a position subordinate to the 'necessities of the situation'[65]; accommodating 'necessary' emergency responses is the new guiding value.

In sum, the substance and character of these alterations to the doctrine indicates a shift towards greater accommodation of State responses to emergencies. This shift contained some paradigmatic examples of emergency-type responses. These changes are significant and have operational consequences which are explored below.

6.4. Implications of an 'Emergency' Shift

The previous sections have outlined how the CESCR's approach to retrogression and 'emergency' was modified in the crisis context. This section will assess some of the dangers of these changes. This is important because emergency regimes have historically been the setting for some of the most extensive and grave departures from human rights. [66] The

[59] Gross and Ní Aoláin (n 51) 58.

[60] ibid. eg Nicaragua, Portugal, South Africa, Peru.

[61] *International Covenant on Civil and Political Rights* (n 20) art 4(2).

[62] Chairperson of the CESCR (n 3) (emphasis added).

[63] ibid.

[64] Chairperson of the CESCR (n 3).

[65] Gross and Ní Aoláin (n 51) 173.

[66] Joan F Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' (1985) 7(1) Human Rights Quarterly 89, 91.

major (but not the only) threats coming from the Letter can be categorised in terms of 'incommensurate balancing', threats to the foundational principles of socio-economic rights, and the inadequacy of safeguards.

6.4.1. An appropriate test?

The construction of the Letter's new test of non-retrogression has the potential to raise a number of issues for socio-economic rights. The second condition set down by the Letter requires States to assess whether their proposed policies are:

> 'necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights'.[67]

As there are two possible interpretations of this text, it is difficult to know with certainty how the Committee will give effect to it.

The test, read strictly, has two incongruent parts. On the face of it, the Letter requires that measures enacted be both necessary and proportionate. Yet, the Letter goes on to define this 'necessary and proportionate' test as requiring that the policy that is best for (least 'detrimental' to) the protection of socio-economic rights be selected. These two strands of the test sit uncomfortably together, and the 'necessary and proportionate' test effectively becomes subsumed. Indeed, on this reading, the test is not readily recognisable as a condition of necessity and proportionality. Rather, it requires States to choose the measure least detrimental to the rights. As such, a measure proposed by a State would, according to this reading, be tested against whether the alternative is more detrimental for socio-economic rights – not according to whether it is necessary and proportionate.

Another (and more plausible) reading of the CESCR's test is possible, however. In this reading, the 'necessary and proportionate' test outlined in the Letter can be seen as intended to ensure that a proposed policy is necessary and proportionate *in the context of the financial and economic crises*. The Letter's clause 'in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights', might then be read as meaning 'having due regard for economic, social and cultural

[67] Chairperson of the CESCR (n 3).

rights'. Such a reading is justifiable given the CESCR's own usages,[68] the incongruence of the test when read strictly, and the context in which the Letter was written.[69]

Thus the test might, in practice, be said to read: 'measures should be necessary and proportionate in the context of the crisis, and having due regard for economic, social and cultural rights'. This interpretation seems closer to what the CESCR was trying to achieve. Elsewhere in the Letter the Committee is preoccupied with balancing socio-economic rights with the economic situation of the day.[70] Contextually, it is clear that the concern was not with States that were choosing between two rights-friendly policies (as is suggested by a strict reading), but with States that were enacting measures to deal with the financial and economic crises that were unnecessarily and disproportionately damaging socio-economic rights.

Yet, if the latter interpretation was the CESCR's intention, then it raises serious questions about how such a proportionality analysis might be carried out. It would entail balancing rights against neoliberal economic 'imperatives'. Before even reaching such a point of balancing, the CESCR would have to concede that rights are commensurate with a specific kind of economic benefit.[71] To be clear, this is an entirely different contention to the widely accepted view that the realisation of socio-economic rights depends deeply on resource allocation.[72] Such balancing would instead concede that economic 'necessities' can 'buy-out' rights protections.[73] This is particularly problematic given the lack of regard had for socio-economic rights by neo-liberal 'necessities'.[74] Moving towards such a position risks representing the rights themselves as market imperatives.[75]

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[68] The CESCR has abbreviated the full version of the Letter's test to simply require the measure to be 'necessary and proportionate'; CESCR, *Concluding Observations: Iceland* (n 8) para 6.

[69] An interpretation justified under; *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980, 332 UNTS 1980) art 32.

[70] For example, the acceptance that 'a lack of growth, impede[s] the progressive realization of economic, social and cultural rights'; Chairperson of the CESCR (n 3).

[71] Cass R Sunstein, 'Irreversibility' 4 <http://papers.ssrn.com/abstract=1260323> accessed 20 September 2016.

[72] See, eg, Manuel Couret Branco, *Economics Versus Human Rights* (Routledge 2009) 8.

[73] Rejecting balances between socio-economic rights and neoliberal economic imperatives does not necessarily preclude the balancing of those rights against other referents, including (sustainable) economic referents of a different kind. This will especially be the case where the referent can be shown to genuinely represent 'the legitimate interests of the community' and can thus be accommodated under article 4 ICESCR; Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 194.

[74] Paul O'Connell, 'On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights' (2007) 7(3) Human Rights Law Review 483, 484.

[75] Joe J Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony' (2014) 27(1) Leiden Journal of International Law 11, 28.

If commensurability were to be conceded, the task of proportionality analysis would only become more difficult. It would be immensely difficult to accurately identify and measure in terms of economic statistics the 'benefit' of an isolated policy that reduced rights protection. Even if this were possible, appraising this would be an unenviable task. In reality, without such figures (whether as a result of the State being either unable or unwilling to provide them) the CESCR would be left having to rely on a heavily subjective and rhetorical assessment of the benefit of reducing rights protection. Given the prevalence of highly subjective rhetoric in this arena, including the neo-liberal rallying call 'There Is No Alternative', reliance on a necessity test seems to do little to examine the relative importance of decision-making factors.

In subsequent General Comments, the CESCR has moved away from this confused necessity and proportionality test, towards only requiring that measures are necessary. Although still at odds with some earlier versions of retrogression and the thrust of the ICESCR, this is an improvement on the original Letter criteria.

The other stage of the CESCR's test for permissible crisis measures requires that measures enacted by States are temporary.[76] The problem of becoming 'stuck' in a temporary state of emergency has been well critiqued by others and those problems apply here also.[77] In addition, the fact that a violation was temporary is not, in a meaningful sense, sufficient to justify the action and such an approach would move towards a human rights' 'law of averages'.

6.4.2. General threats to socio-economic rights

The *pseudo* derogation test that is contained in the Letter is a new development that has the potential to blur the doctrinal distinctions between the ICESCR and its counterpart the ICCPR. The individual ICESCR rights are already qualified in a manner that ICCPR rights are not (i.e. through the mechanism of progressive realisation). Notwithstanding the many commonalities between the two sets of rights, the incorporation of a liberal derogations regime into the already relatively flexible ICESCR would result in two sets of flexibilities; both progressive realisation and derogation.

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[76] This condition is retained in the versions that have come since; CESCR, *General Comment 22* (n 36) para 38; CESCR, *General Comment 23* (n 36) para 52.

[77] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112(5) The Yale Law Journal 1011, 1073ff; Greene (n 51) 1765. The spectre of 'permanent austerity' might also be an example of this.

As well as blurring the doctrinal distinctions between the Covenants, the Letter threatens to further entrench tired stereotypes about the supposed differences in the 'nature' of the rights. The CESCR developing a focus on economic emergencies while the Human Rights Committee primarily focuses on non-economic emergencies is problematic.[78] It reinforces the traditional message that only socio-economic rights have economic consequences (and thus that economic emergencies are only relevant to those rights). By contrast the 'security' dimension of socio-economic rights is neglected in this binary divide, leaving the regime unable to deal with the issues of security and instability that can cause and result from violations of these rights.[79] This polarisation leaves the reformed emergency regime in the CESCR's Letter arguably less able to deal with cross-cutting emergencies than before.

This change of approach towards retrogressive measures also has potential to damage the key progressive realisation obligation of the ICESCR. This obligation has been thought of as a ratchet, requiring that socio-economic rights standards are raised ever higher, with slips in those standards (retrogression) only permissible in limited circumstances and to a limited extent. In this sense, the protection of ICESCR rights in doctrine and in practice has relied heavily upon the 'precommitence' of States.[80] Yet under the Letter's regime, with fewer and weaker conditions imposed on potential backwards steps, the capacity of non-retrogression to prevent change has been substantially reduced. Progressions in rights standards may no longer be so difficult to reverse and hard fought improvements may be less enduring.

6.4.3.Inadequate safeguards

If the regime of emergency retrogression is to be retained by the CESCR, significant safeguards should be built in to it. For example, in the Letter, the procedural requirements for declaring, defining the boundaries of, and the process for ending a period of emergency under the ICESCR are manifestly unclear.

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[78] The Human Rights Committee notes the examples of 'a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident'; Human Rights Committee, *General Comment 29: States Of Emergency (Article 4)* (n 70), para 5.

[79] This stereotyping is at odds with the UN's various food security and human security initiatives; 'UN Trust Fund for Human Security' <http://unocha.org/humansecurity/> accessed 30 September 2014; 'Global Food Security' <http://www.un-foodsecurity.org> accessed 20 September 2016.

[80] This strategy partly mitigates the impact of 'fear' upon the decision-maker; Posner and Vermeule 'Accommodating Emergencies' [2003] Stanford Law Review 605, 639–40.

The question of what constitutes an emergency, and who is to declare it, is not addressed by the CESCR.[81] This is a clearly crucial gateway that States wishing to take advantage of increased emergency accommodation must pass through. The CESCR in its Letter seems to highlight the important features of the 2007/8 emergency as being the existence of 'economic and financial crises, and a lack of growth'.[82] This does not amount to generalizable advice as to what constitutes an emergency. If the 2012 version of the non-retrogression doctrine continues to have any relevance, the CESCR should perhaps follow the Human Rights Committee in issuing a full General Comment on the issue,[83] be more rigorous in defining an 'emergency', and offer clear guidance on whether emergencies are to be declared by States or the CESCR in future.

Similarly, the CESCR's brief Letter offers no guidance on when and how emergency situations are concluded. Is a further letter to be expected from the CESCR on the conclusion of the financial and economic crises, for example? How is the existence of the crisis itself, to be separated from the effects of the crisis, and which should determine the conclusion of the situation? Answers to these questions are crucial if the increased crisis flexibilities are to be themselves to be sufficiently circumscribed.

Nor does the new regime outlined by the CESCR provide guidance on the *ex post facto* review of the measures taken during the crisis. If the Letter and its model of retrogression is to be retained, greater provision should be made in the State Reporting Guidelines for detailing those emergency situations which have been declared and the measures taken as a result of them.[84] Given the difficulties with necessity and proportionality analyses and the vagaries of the 'temporary' provision, *ex post* review of 'emergency' measures should particularly address the minimum core and non-discrimination requirements.

6.5. Improving Resilience through (Re)constructed Retrogression

In addition to the particular direction that the Letter took the doctrine, the very fact of the changes is also a concern. Altering the doctrine at all, and especially altering it to take a damaging course, does significant harm to retrogression. It sets the norm up to fail through

[81] Prior to 2012, the CESCR seems only to have expressly characterised three situations as 'emergencies' in relation to water, housing and malnutrition in prisons, but had offered no guidance on the factors that constituted the situations as such; See CESCR, *Concluding Observations: Yemen* (UN Doc E/C12/1/Add92 2003) para 19; CESCR, *Concluding Observations: Canada* (UN Doc E/C12/1/Add31 1998) para 46; CESCR, *Concluding Observations: Madagascar* (UN Doc E/C12/MDG/CO/2 2009) para 28.

[82] Chairperson of the CESCR (n 3).

[83] Human Rights Committee (n 78); Human Rights Committee (n 53).

[84] CESCR, 'Guidelines On Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights' (2009) UN Doc E/C.12/2008/2.

confusing it at the very time at which clear applications of the doctrine are needed in order to steer crisis responses.

The (re)constructed doctrine must therefore be resilient to the stresses of crises, and be able to remain stable, clear and applicable even in politically sensitive situations. At the same rate, however, it must be designed to be crisis-ready. As was discussed at the beginning of this chapter, the Committee faced a context of political, resource and other pressures during the crises that meant developing strong standards during the timespan of the crises was unlikely. A successful strategy for responding to future crises must, therefore, ensure that normative frameworks are in a strong and settled position prior to the break of the crisis. As part of that, there is adequate room for adjustment in the norms; enough flexibility that the obligations do not need to be broken and re-made during the crisis, but not so much leeway that States obligations are negated during times of crisis.

A crucial regulating device in ensuring that this balance is struck, as was alluded to earlier, is a guiding purpose for the doctrine. This purpose acts as a standard against which to judge any changes to the retrogression which may be proposed during a crisis. However, it also acts as a backstop, or boundary, which can highlight when suggested changes stray too far from the correct role for retrogression.

These characteristics – a clearer, more stable doctrine, and a guiding and delimiting purpose – can contribute a resilience for retrogression that has so far been absent. Such resilience in turn improves the chances of the doctrine being an operational success and providing an effective tool to actors during crisis situations.

The (re)constructed doctrine incudes many of those characteristics necessary for resilience. The (re)constructed retrogression was defined as:

> an action, inaction or contribution to a trend which is likely to negatively affect the progressive realisation of individuals' ICESCR rights.[85]

This has unambiguous potential to be used in crisis situations. In particular, the focus on negative trends is a useful flexibility device in crises, giving the CESCR adequate discretion to determine when something has become a trend, and whether or not it is sufficiently negative so as to constitute a retrogressive measure. However, in contrast to the version of the doctrine in the Letter, it is important to note that the flexibility rests with the CESCR rather than the State; there is also no collapsing or removal of State obligations. The

[85] Chapter 3, p118.

(re)construction follows the ICESCR's traditional pattern of treating emergency and everyday situations alike. Thus, the 'exigencies of the situation' and more general contextual factors that are brought in through proportionality analyses, are not included as referents in this imagination of the doctrine.

With the purpose of furthering the article 2(1) obligation of progressive realisation, the doctrine has a firm and well defined point of reference.[86] In the event that there was a crisis so severe or so unique that change to the doctrine was genuinely unavoidable such an overarching or guiding value could be used to adapt the norm while retaining the thrust and objectives of retrogression. Of course, without being strongly defined there is a danger that *every* crisis comes to be seen as unique and severe.[87] Therefore there remains an important role for the CESCR in resisting the impulse for change that is likely to be felt during crises. Rather, it should aim only to adjust ICESCR norms in truly aberrant examples, such as the rapid collapse of the status of States as primary duty holders in international law, or drug-resistant pandemics with universal effects.

Progressive realisation has been subject to much less change than retrogression, and can therefore provide exactly the sort of stability that is required by the doctrine in crisis situations. It is also a foundational part of the ICESCR meaning that even in the most unusual, unthinkable settings, where the ICESCR continues to stand then so will the progressive realisation obligation.

The combination of these two changes – a flexible (re)construction and a well-defined purpose – can give the doctrine resilience that it has so far lacked. This is crucial to ensuring more effective responses to future crises and concretising the utility of non-retrogression.

6.6. Conclusions

It is unsurprising that the doctrine of non-retrogression, which had already proved malleable, was subject to further adjustment. While, the Committee might have been expected to display greater robustness in its protection of the Covenant norms, the highly pressurised context in which the CESCR was operating can explain its actions.

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[86] Chapter 4, pp115ff

[87] Keith Whittington, 'Yet Another Constitutional Crisis?' (2002) 43 William & Mary Law Review 2093, 2096.

The Letter to States was a brief, but highly significant intervention. It can be given various characterisations, as soft law, rhetorically weighty, or as no more than a note to fill the vacuum of comment on the crises by the Committee. Yet, assuming any of these characterisations, the Letter remains central to our understanding of how the current forms of retrogression have been buffeted by crisis. The CESCR's Letter introduces a number of significant changes and these take the doctrine of retrogression in a new, and somewhat counterproductive, direction.

The Letter signals a concerning move away from the ICESCR's traditional approach to emergencies. It seems to reject – at least in the context of economic emergencies – the uniform application of the Covenant's standards in times of both crisis and 'normality'. Instead, it endorses a *quasi*-derogations regime through the doctrine of non-retrogression, allowing States new flexibilities at the very time close scrutiny was required. Beyond this significant alteration, a number of other issues were imported into the doctrine by the Letter. Weak safeguards and confused procedures make the enforcement of any standards whatsoever a real difficulty. Additionally, the potential revival of tired stereotypes which imply security emergencies are relevant to CPR, while economic emergencies are relevant to ESR, is an another flaw with the construction of the Letter's emergency response.

The deficiencies of retrogression as it appears in the CESCR's Letter act as a cautionary tale. The Letter was not – or at least need not have been – a rushed production. There was, after all, around four and half years between the break of the crises and its release. Yet, its brief contents include more problems than is reasonable. This is an indication of how the pressures of a crisis situation can distort and damage normative development. The aim for the CESCR, should be to avoid such intra-crisis development of the ICESCR's obligations.

In this vein, it was argued that the doctrine of non-retrogression should be resilient, containing adequate flexibility and giving sufficient guidance on how the doctrine should be modified if the circumstances absolutely demanded it. Several features of the (re)constructed doctrine were highlighted to show that it could contribute exactly that combination of flexibility and an overall value.

Although an isolated example of how the doctrine of non-retrogression was modified in a crisis, the chapter provided an important case study of how the fragility of the doctrine, the institutional limitations of the CESCR, and a threatening context can lead to significant doctrinal changes. It also suggested how such a retreat in retrogression's capacity could be avoided in future.

The issues addressed here, however, should be read in combination with the preceding analysis on engagement with structural issues, and the following discussion of micro actors and the practicalities of using retrogression. Each of these have potential overlaps with situations of crisis, and demonstrate the importance of retrogression not only having resilience, but also the ability to engage with high-level structural issues (e.g. harmful economic paradigms), to respond to the demands of micro groups (e.g. a need for remedies to crisis-driven impacts), and to be practically implementable (e.g. provable with reasonably available data). By seeing these challenges in combination the potential and strength of the (re)constructed doctrine can best be seen.

Chapter 7

Micro Responsiveness

7.1. Introduction

While the (re)constructed retrogression can play important functions in improving resilience and engagement with structural issues, it can also work as a vehicle for opening the ICESCR system up to greater responsiveness to micro groups. The (re)constructed doctrine of non-retrogression might be used to supplement the difficulties with progressive realisation and improve the use of both obligations. The analysis in this chapter tests the extent to which this can be the case, and whether the (re)constructed doctrine might better support the progressive realisation obligation through more effectively responding to 'micro' concerns. While the ICESCR system does involve 'micro' actors[1] though a number of processes, there remain a wide range of institutional, practical and normative barriers that restrict the CESCR's ability to properly take account of these groups' concerns. This is especially true – as is discussed below – of certain types of micro actor which tend to be most affected and excluded by some features of the system. This limited approach is problematic given the extensive benefits that can come through harnessing the informational and organisational power that can exist at the local level.

This chapter sits alongside the previous two in highlighting some of the more substantial issues faced by the doctrine of non-retrogression, and in showing how the (re)constructed doctrine might address them. In contrast to the previous two chapters which looked at large scale issues of structural threats and resilience in crises, however, this chapter looks to the opposite end of the ICESCR's concerns; individuals. It is crucial that such attention is given to how non-retrogression works for individuals and small groups, as without it there is a danger that the Covenant becomes divorced from them.

Delineating a category of 'micro' groups and outlining the extent to which their concerns should be responded to, is a challenging task. Both definitions are context dependent and so the large body of work on social movements and political participation can only be imperfectly applied. These questions recur throughout the chapter, but are addressed initially in the following section. However, as will be seen in section (7.3.), even where engagement with these groups represents a clear opportunity there are currently multiple barriers preventing the CESCR fully responding to their concerns. A subsequent section

[1] The complexities of defining such actors is discussed below at section 7.2.1. The understanding adopted below is that micro actors can be seen as *not,* or at least *not solely,* state actors, international or 'foreign' groups, elite or power-holding groups, or structurally determined movements. Instead, micro actors are understood as those which construct themselves to have at least some of the characteristics of a subaltern group.

(7.4.) underlines the valuable contributions that such groups can bring. A final substantive section draws on this outline of barriers and benefits to assess how the (re)constructed retrogression and other reforms might enable greater micro engagement. It shows that the (re)construction can be used to ensure greater *ex ante* review, to ground the Covenant, and to incorporate individual stories.

7.2. Defining 'Micro Responsiveness'

There are two key definitional questions that need answering before proceeding to a deeper examination of the barriers to, and benefits of, fuller engagement with these actors. First, who are the 'micro' actors being referred to? And second, what is meant by 'responsiveness' in this context?

In answering these questions, the chapter draws on social movement and critical theory. This leads to a working definition of micro actors as *not* or at least *not solely* state actors, international or 'foreign' groups, elite or power-holding groups, or structurally determined movements. Responsiveness is understood below according to the terms of the ICESCR, which designates a primarily enforcement role to everyone who enjoys the Covenant's protections.

7.2.1. Defining 'Micro'

The first of these questions – on what or who a 'micro' actor is – is substantially more complex than can fully be conveyed here. Most simply, a micro actor can be defined in the negative as 'not a macro actor'. This might lead us to broadly define the State and international institutions as macro actors and micro actors as those 'others' (including NGOs, academic communities, informal organisations (both virtual and 'real'), and individuals). This definition is problematic insofar as it denotes macro actors as a primary category, and participates in a demotion and 'othering' of those actors not imbued with State or inter-State powers. In addition, it is ill-equipped to categorise actors that are relatively small but which hold (inter-)State power (such as local government or smaller UN organs) or actors which are very large organisations but which are, at least in a formal sense, powerless (such as Amnesty International). When size is taken into account, it

becomes difficult to define Amnesty International[2] as a micro actor while local councils or municipalities[3] are defined as macro actors.

The definition might instead be re-orientated to consider the geographic sphere in which an actor operates. Doing this we might class those actors that are 'national' or 'international' as macro, and the plurality of actors which operate at the sub-national level as 'micro' to a greater or lesser extent. Such categorisations are widespread, and typically emphasise different levels or types of activity.[4] In this context, however, Guha's four groups (originally identified in the Indian society of the time) are more useful as the categorisation divides along lines which resonate with boundaries seen in the human rights system. Guha's classification has been widely used to stress the position of certain 'voiceless' sections of society.[5] It divides society into: dominant foreign groups; dominant indigenous groups working at the national level; dominant indigenous groups working at various local levels; and subaltern[6] groups.[7] This division is attractive where it confirms what human rights advocates already know; that there are some situations where the international or 'foreign' actor will be seen as an elite outsider.[8] However despite this intuitive appeal, the model still struggles to tell us which groups should be treated as micro. The third group – the dominant indigenous groups working at various local levels – are referred to as a buffer group between the subaltern and elite classes.[9] Are these groups (always) a micro enterprise? A second difficulty relates to the 'ambiguities and contradictions'[10] in the categorisation. A group might be subaltern on some issues and in some senses, but firmly elite in others. The categorisation also fails to deal satisfactorily with the inter-national exchanges between the various groups. Cross-border movements (especially those

[2] '3 million supporters, members and activists in over 150 countries and territories, in every region of the world'; Amnesty International, 'Amnesty International 50th Anniversary: Facts and Figures' (2011) 1 <http://static.amnesty.org/ai50/ai50-facts-and-figures.pdf> accessed 20 September 2016.

[3] Around half of Brazil's 5,507 municipalities have fewer than 10,000 inhabitants. A quarter of them (around 1,400) have fewer than 5,000 residents; Inter-American Development Bank, 'National Program to Support the Administrative and Fiscal Management of Brazilian Muncipalities' (2014) para 1.14 <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=437370> accessed 20 September 2016.

[4] Saskia Sassen, 'Local Actors in Global Politics' (2004) 52(4) Current Sociology 649; Philip C Jessup, *Transnational Law* (Yale UP 1956) 1; Jinseop Jang, Jason McSparren and Yuliya Rashchupkina, 'Global Governance: Present and Future' (2016) 2 Palgrave Communications 1, 2.

[5] Notably, Gayatri Chakravorty Spivak, 'Subaltern Studies: Deconstruction Historiography' in Jonathan D Culler (ed), *Deconstruction: Critical Concepts in Literary and Cultural Studies* (Taylor & Francis 2003); Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton UP 2012) especially chapter 4.

[6] A term that has been defined as – 'the demographic difference between the total [...] population and all those whom we have described as the "elite"'; Ranajit Guha, 'On Some Aspects of the Historiography of Colonial India' in Ranajit Guha (ed), *Subaltern Studies I: Writings on South Asian History and Society* (1982) 44.

[7] Ranajit Guha (ed), Subaltern Studies I: Writing on South Asian History and Society (OUP, 1982) cited in Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Reprint edition, University of Illinois Press 1988) 284.

[8] Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004) 26(1) Human Rights Quarterly 63, 65–66.

[9] Spivak (n 7) 284.

[10] ibid.

facilitated by technology) would entail a group that is subaltern in Greece, for example, being indicted as a 'foreign elite' when combining with equivalent groups in Italy or anywhere else.

A definition of exclusion, and a group-based categorisation both rely on differentiating between the role, standing, and capacity of groups. As such, both of these definitions have a tendency to prioritise groups with existing forms of power.[11] By using definitional tactics, both approaches ascribe merit to a specific range of features, and exclude other relevant factors.

Social movement theory captures greater nuance by taking into account a more diverse range of features. It focusses less on external evaluations of the group and more on the internal organisation and functioning of the movement. One conception of the social movement – and the one that sits closest to those categorisations just discussed – focuses on structures as a mechanism for defining the group. These structures include 'economic resources, political structures, [and] formal organizations'.[12] Yet this dominant approach to social movements has been contested *inter alia* on the ground that theorists have over-emphasised the stable and more easy-to-see structural dimensions of movements.[13] This over-emphasis, or bias,[14] effectively downplays the fluid 'strategy, agency and culture' that exists within groups.[15] Predictably, this reaction to the dominant focus on structures has spawned a second strand of social movement thinking. This constructionist approach emphasises that the movements and their success are a function of more than simply structural inputs, but rather rely on an understanding of groups as constructing themselves and their own history.[16] This approach has been cast as an appeal to, and an appreciation of, the 'emotions' of the movement.[17]

Of course any definition, but perhaps especially the more constructionist approaches, must also be met with an appreciation of how such definitions will shift over time. While a movement may start with a particular size, level of resource, and identity of itself, this is

[11] ibid 279.

[12] Jeff Goodwin and James M Jasper, 'Introduction' in Jeff Goodwin and James M Jasper (eds), *Rethinking Social Movements: Structure, Meaning, and Emotion* (Rowman & Littlefield 2004) vii.

[13] Jeff Goodwin and James M Jasper, 'Caught in a Winding Snarling Vine: The Structural Bias of Political Process Theory' in Jeff Goodwin and James M Jasper (eds), *Rethinking Social Movements: Structure, Meaning, and Emotion* (Rowman & Littlefield 2004) 4. Cf Charles Kurzman, 'The Poststructuralist Consensus in Social Movement Theory' in Jeff Goodwin and James M Jasper (eds), *Rethinking Social Movements: Structure, Meaning, and Emotion* (Rowman & Littlefield 2004) 111.

[14] Goodwin and Jasper, 'Caught in a Winding Snarling Vine: The Structural Bias of Political Process Theory' (n 13) 4.

[15] ibid.

[16] Kurzman (n 13) 117.

[17] Deborah B Gould, 'The Emotion Work of Social Movements' in Jeff Goodwin and James M Jasper (eds), *The Social Movements Reader: Cases and Concepts* (3rd edn, Wiley-Blackwell 2014).

likely to evolve over time. Consequently, systems for seeking out the views of groups of a certain type must reflect such evolutions and reflect on how the role for a group within the system might change.

This discussion of what constitutes a micro actor is to ensure clarity about what these actors are, and what they are not. Such clarity is important as the chapter progresses to argue for a fuller role for these actors and so it is crucial that they are correctly identified. A revised doctrine of non-retrogression which served to reinforce the roles of those actors already dominant in the CESCR's processes would add little. Instead, the aim is to reach those groups that have been excluded through the ICESCR's doctrinal and institutional barriers, and by their own limitations. It is therefore of central importance that the doctrine aids those actors without significant power in the form of the controls of the State, through resources, through international voice, or through organisational structures. This cuts across the different categorisations introduced above. Constructionist social movement theory sets aside the focus structural features to emphasise self-definition and identity. Guha's theory of subalternity highlights well the power that a well-connected international body can have relative to local subaltern groups.

Together these theories can be combined to identify the micro actors that we are concerned with in the current context. It allows micro actors to be seen as *not* or at least *not solely* state actors, international or 'foreign' groups, elite or power-holding groups, or structurally determined movements. That is to say, that in what follows, micro actors are understood as those which construct themselves to have at least some of the characteristics of a subaltern group. As the chapter progresses, greater detail will be added to this identification to take account of the particularities and consequences of human rights, gender, and Third World perspectives for these groups.

7.2.2. Defining 'Responsiveness'

The second main definitional point that needs addressing at this stage is the understanding of 'responsiveness' to be adopted in this context.[18] This understanding is necessarily both a normatively-laden and finely balanced judgement. It is normatively-laden insofar as the definition will be affected by one's view of the role and importance of the international human rights law relative to micro concerns. The normative question can be substantially

[18] The contextual aspect is particularly important here as responsiveness to the concerns of micro actors is different, for example, to structural threats. The signals that a response is needed, and the action (or response) which follows are quite different.

by-passed by referring to the ICESCR itself for guidance on the position of the 'micro' concern within the operation of the treaty.

The preamble to the Covenant notes, for example, that the individual has 'duties' to others in the community in relation to the ICESCR rights.[19] Specifically these preambular duties seem to require us all to ensure the promotion and observance of the rights. In a similar vein, the article 13 provision on the right to education refers to the agreement of States that education should enable individuals to 'further the activities of the United Nations for the maintenance of peace'.[20] These provisions signal a significant delegated role for individuals and groups (micro actors) in ESR realisation. However, these provisions also seem to imply that the nature of the role is an enforcement and local monitoring one, rather than a standard-setting one. As the ICESCR carves out this particular role for individuals and groups, it can be concluded that the CESCR should be especially responsive to micro concerns on these issues of enforcement and monitoring.

The concept of 'responsiveness' used, additionally entails a balanced judgement. This is due to the fact that the relationship between human rights and micro concerns can never be entirely led by (or totally 'responsive' to) either human rights or micro concerns. Implicit in this discussion of balancing, is the proposition that human rights and micro concerns are not always mutually reinforcing. When the diversity of micro concerns is considered, it becomes obvious that some of these concerns are themselves contrary to the fundamentals of human rights standards, or are expressed in such a way as to make them so. Clear examples of such micro concerns would include groups that campaign for the reintroduction of the death penalty[21] or that seek to prevent girl children accessing education,[22] or groups which seek to achieve their objectives through suicide bombing.[23] In these extreme cases, there is little difficulty in recognising that the groups have substantially different aims to the international human rights framework and that their claims upon the framework should be substantially rejected. Indeed this recognition that

[19] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) preamble.

[20] ibid art 13(1).

[21] 'Restore Justice Campaign' <http://www.restorejustice.org.uk> accessed 20 September 2016.

[22] See, for example, the Pakistani Taliban's campaign made famous by Malala Yousafzai; 'Malala Yousafzai - Facts' <http://www.nobelprize.org/nobel_prizes/peace/laureates/2014/yousafzai-facts.html> accessed 20 September 2016.

[23] Robert J Brym, 'Suicide Bombing' in Jeff Goodwin and James M Jasper (eds), *The Social Movements Reader: Cases and Concepts* (3rd edn, Wiley-Blackwell 2014).

some groups will have aims that are essentially destructive of human rights is present in the ICESCR itself.[24]

However, a balancing function becomes more important in less extreme situations. A more difficult situation arises in respect of groups which are not 'human rights' movements, but which have concerns that overlap to some extent with human rights objectives. These might be campaigns for clean water,[25] fair allocation of housing,[26] or perhaps anti-austerity movements.[27] The extent to which the CESCR should be responsive to the concerns of these micro actors, will require a careful balancing act. The opportunities for human rights promotion, increased information, and a wealth of specialised expertise have to weighed against any conflicts with the movements' objectives, and the potential for the ICESCR framework to be stretched too far.

7.3. Barriers to Responsiveness

There lies potential for a more productive micro groups-ICESCR relationship that can improve enforcement and better address the nuances of rights violations as experienced. While that potential is already being realised in a number of respects, there are also a number of barriers that exist. These range from doctrinal issues with the ICESCR (such as the underuse of the progressive realisation and retrogression obligations) to the more institutional issues with the CESCR (such as its resource constraints and backlog of work). The limitations of the Committee are accentuated and magnified by the nature and functioning of many of the micro groups.

This range of difficulties are not solvable through a single reform to the CESCR or its doctrines. However, there is significant untapped potential in the strength and openness of the progressive realisation obligation. The flexibilities with the article that are often criticised, can be used as a vehicle for addressing various outstanding difficulties with the Covenant. When combined with, and supported by, the (re)construction of retrogression there is a good deal of opportunity for improved micro responsiveness through these mechanisms.

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[24] *International Covenant on Economic, Social and Cultural Rights* (n 19) art 5(1).

[25] See, for example, 'About Us' (*Clean Water Action*) <http://www.cleanwateraction.org/about/> accessed 20 September 2016.

[26] See, for example, 'About Us' (*Focus E15*) <http://focuse15.org/about/> accessed 20 September 2016.

[27] See, for example, 'The People's Assembly Against Austerity' (*The People's Assembly Against Austerity*) <http://www.thepeoplesassembly.org.uk/what_we_stand_for> accessed 20 September 2016.

In terms of the positive engagement that is already a feature of the CESCR's work, one can point to a range of in-person and remote opportunities for engagement. In-person, there are chances for groups to participate in briefings around the State examination process,[28] and elsewhere in Days of General Discussion.[29] As these processes are both based in Geneva at the CESCR's operational home, it is safe to assume that a range of (perhaps smaller, less-resourced, more geographically distant) groups are excluded from attending. The CESCR ameliorates this exclusion to an extent by accepting written submissions (known as parallel or shadow reports)[30] when considering States' performance and calls for evidence when drafting General Comments.[31] In addition, the growing membership of the Optional Protocol 'club' will to produce further avenues for engagement. All of these processes present an opportunity for substantive micro concerns to be fed into the Committee's State-specific or normative guidance.

Without substantial empirical research, it is impossible to accurately say how much of an effect (negative or positive) the representations of micro groups actually have on the CESCR's approach or outputs. A snapshot survey undertaken by O'Flaherty suggests that the Lists of Issues and the associated dialogues with States have an inconsistent relationship with the resulting Concluding Observations.[32] However, even without knowing the exact nature or success of this relationship, it is possible to identify the institutional and doctrinal changes that would promote stronger responsiveness to the concerns of micro level actors.

7.3.1. Doctrinal barriers

There are a number of dynamics built into the ICESCR that are likely to affect the Committee's ability to fully respond to the concerns of grassroots micro groups. Many of these focus on the *type* of activity that is required by the ICESCR regime.[33] It being a document with international legal effect, its contents and the processes surrounding it are, naturally, of an international and a legal nature. While this character has obvious benefits

[28] 'Information for Civil Society Organisations' (*Office of the High Commissioner for Human Rights*) <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx> accessed 20 September 2016.

[29] 'General Discussion Days' (*Office of the High Commissioner for Human Rights*) <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/DiscussionDays.aspx> accessed 20 September 2016.

[30] 'Information for Civil Society Organisations' (n 28).

[31] 'General Discussion on the Draft General Comment on Article 7 of the International Covenant on Economic, Social and Cultural Rights: Right to Just and Favourable Conditions of Work' (*Office of the High Commissioner for Human Rights*) <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2015.aspx> accessed 20 September 2016.

[32] Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6(1) Human Rights Law Review 27, 39–41.

[33] A concern that can be seen as applicable more broadly to the human rights system, and one shared Kennedy (albeit on different grounds) in, David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Human Rights Journal 101, 110.

in terms of increasing the reach and authority of the ICESCR system, it also implies a number of difficulties as far as micro group engagement is concerned.

First amongst these difficulties is the *de facto* focus of the progressive realisation obligation, which often looks at the higher levels of State policy rather than at localised issues. The operation of progressive realisation is important to consider in the context of the barriers to micro responsiveness of the ICESCR's operation. This is due to its status as the primary general obligation in the ICESCR, and in the CESCR's own words 'Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship' with the rest of the articles.[34]

It is possible to apply the article 2(1) obligation to the situation of an individual or small group, and there are several examples of shadow reports to the CESCR doing so.[35] Applying the obligation to the State in such a scenario involves claiming a right to a progressively improving standard in one's own housing, food, health care provision *etcetera*. Although not doctrinally incorrect, a more holistic reading of the ICESCR text, and the taking into account of General Comment 3 suggests a broader approach.

In contrast to the substantive articles of the Covenant,[36] article 2(1) is couched in general terms and emphasises State duties rather than individual entitlements. This level of generality tends to suggest that progress on realising the rights of the Covenant should be considered across the State as a whole. For example, article 2(1) refers to 'the rights' rather than a specific right or 'each right', and similarly avoids linking those rights to 'individuals' or 'persons'.[37] On the actions that are required by the State, the measures that are singled out – 'economic', 'technical' and 'legislative' – would also usually be associated with a high level, rather than individual, action. Furthermore, in the most relevant General Comment on the obligation, the CESCR takes a similarly pan-State view.[38] As a result of this dynamic,

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[34] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23 1990) para 1.

[35] See, for example, *Compilation of Summaries of Canadian NGO Submissions to the CESCR in Connection with the Consideration of the Fourth and Fifth Periodic Reports of Canada* (UN Doc E/C12/36/3 2006) 37, 38; Amnesty International, *Double Standards: Italy's Housing Policies Discriminate Against Roma* (Amnesty International 2013) 16; Free Legal Advice Centres (FLAC), *Parallel Report in Response to Ireland's Third Report under the International Covenant for Economic, Social and Cultural Rights* (Free Legal Advice Centres (FLAC) 2014) 65, 87, 91.

[36] See Chapter 5, p135. Cf also the much less generalized attention to delimiting the entitlements of the individual in; *International Covenant on Economic, Social and Cultural Rights* (n 19) preamble.

[37] Cf Christian Courtis, 'La Prohibicíon De Regresividad En Materia De Derechos Sociales: Apuntes Introductorios' in Christian Courtis (ed), *Ni Un Paso Atrás: La Prohibicíon De Regresividad En Materia De Derechos Sociales* (Editores de Puerto 2006) 4.

[38] See, for example, the CESCR's interest (only) in situations where 'significant number of individuals' lack essential levels of food; CESCR, *General Comment 3* (n 34) para 10.

the progressive realisation obligation is imbued with a primarily policy and/or 'high level' focus.

This creates an awkward relationship between the generalised and high-level approach of article 2(1), and the individualised approach within the substantive articles. In a clear example from the Inter-American Court, Melish shows how a high level approach to progressive realisation can act as a barrier to the justiciability of individual cases and argues that:

> …'progressive development' is designed to assess not causal responsibility for individualised impairments in the enjoyment or exercise of rights, but rather statistical achievement of rights over the national population or vulnerable subgroups within it…[39]

This approach to the obligation requires an assessment of progress in large policy areas (rather than on isolated issues) in order to make an evaluation of a State's compliance with its obligation.[40] There are clear positives to this as the format of the progressive realisation obligation encourages the Committee to deal with the 'bigger picture'.[41] However, in this process the specific and perhaps local or highly technical demands of the micro group can easily be lost.

This 'policy progression' approach is problematic on more levels than can properly be detailed in this context. However, crucially for micro responsiveness, the approach points away from an ICESCR system that accepts the individual as the core unit of its concerns, and instead seeks aggregate societal improvements.[42] This, in practice, means that there are two qualifications to the individual's right to the progressive realisation of her rights; the extent of available resources and the state of others' rights enjoyment.[43] Thus to demonstrate that a State has breached its duty to progressively realise a right, a micro group would have to demonstrate both that there is available resource *and* that their concern would be the best use of that resource. In showing that a claim represents the best use of available resource it would have to be demonstrated both that it is preferable to other (direct) rights claims, and also that the resource is not better used for macroeconomic purposes (e.g. that 'spare' resource should in fact be used as a fiscal stimulus or to reduce a

[39] Tara J Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed), *Social rights jurisprudence: emerging trends in international and comparative law* (CUP 2008) 386. See further fn 94.

[40] This difficulty is explored in greater depth in Chapter 8, pp1214-219.

[41] Although, as noted in Chapter 5, pp140-143, it often chooses not to capitalise on this potential.

[42] Although note that these are *qualified* aggregate improvements (insofar as an aggregate improvement would be insufficient where discrimination existed or the minimum core was unmet).

[43] The latter of these qualifications commonly being subsumed within the 'maximum available resources' test; Radhika Balakrishan and others, 'Maximum Available Resources & Human Rights: Analytical Report' (Rutgers University 2011) 5ff, especially 7.

budget deficit).[44] Even where it can be shown that there is available resource that should be allocated to one's concern, in some contexts it remains open for the State to claim that it has taken reasonable measures in order to progress.[45] Requiring such a set of systematic proofs makes engagement by micro groups extremely difficult.[46]

A second potential barrier to the CESCR responding to micro concerns are the structures of the Optional Protocol. The Protocol itself is clearly a landmark development, and it is likely to result in a range of new opportunities for micro actors. Beth Simmons describes the new process as 'an important form of civil society empowerment'.[47] Yet at the same time Simmons is careful to qualify that the legitimacy of the standards developed through individual communications will be dependent upon the Committee's willingness to look to local perspectives and constraints.[48] It is important not to prejudge the success of the Optional Protocol communications process before it has properly developed a body of jurisprudence. However, even at this stage a number of potential barriers can be identified that might limit micro groups' contribution of exactly these sort of crucial local perspectives.

The legalism and lawyers' dominance of the discipline that generally surround human rights is something often remarked upon and the tendencies contribute to a number of the critiques of the human rights movement.[49] It has also been noted that such legalism acts to produce an elite and a 'top-down' system that isolates the contributions of the micro groups that we are concerned with here.[50] A particular focus on the Optional Protocol as a potential barrier to micro responsiveness is justified in light of the critiques that have been levelled at it. Opponents to the justiciability of the ICESCR rights have argued the Optional

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[44] In this vein see; Mary Dowell-Jones, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (2015) 15(2) Human Rights Law Review 193, 206.

[45] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013, UN Res A/RES/63/117) art 8(4); *Government of the Republic of South Africa and Others v Grootboom and Others* (2000) (CCT11/00) [2000] ZACC 19 (Constitutional Court of South Africa) especially [28], [33]; 'Constitution of the Republic of South Africa' (1996) article 26(2); *IDG v Spain* [2015] CESCR Communication 2/2014, UN Doc E/C.12/55/D/2/2014 [14]; Brian Griffey, 'The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11(2) Human Rights Law Review 275; Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39.

[46] For an example of this dynamic in practice (albeit in a slightly different context) see; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (2002) (CCT8/02) [2002] ZACC 15 (Constitutional Court of South Africa).

[47] Beth A Simmons, 'Should States Ratify? - Process and Consequences of the Optional Protocol to the ICESCR' (2009) 27(1) Nordic Journal of Human Rights 64, 69.

[48] ibid.

[49] Saladin Meckled-García, Başak Cali and Anthony Woodiwiss (eds), 'The Law Cannot Be Enough: Human Rights and the Limits of Legalism', *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Psychology Press 2006); Shannon Speed, 'At the Crossroads of Human Rights and Anthropology: Toward a Critically Engaged Activist Research' (2006) 108(1) American Anthropologist 66, 67; Conor Gearty, *Can Human Rights Survive?: The Hamlyn Lectures 2005* (Cambridge University Press 2006) chapter 3; Illan rua Wall, *Human Rights and Constituent Power: Without Model Or Warranty* (Routledge 2013) especially 15.

[50] Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 67, 105; Kennedy (n 33).

Protocol is 'over-legalization run amok'.[51] The basis for this view is easy to see; the addition of 'cases', two opposing parties, submissions from those parties, and 'views' that look awfully similar to a judgment are all suggestive of a new international court. However, as Simmons argues, to view the international complaints mechanism as a court would be a 'contorted caricature'.[52] Where the Optional Protocol system is reminiscent of a fully-fledged judicial system this is merely a 'quasi-judicial'[53] mimicking of domestic or 'hard' international law processes, rather than a recreation of them.[54] This is underlined by the basic scope of the Optional Protocol process; 'we are not in the world of litigation, but instead in the world of communication and persuasion'.[55] The Optional Protocol gives interpretative oxygen to the ICESCR's legal standards more than anything else.[56]

Why, then, has the Optional Protocol process been suggested here as a barrier to micro responsiveness? This potential lies in the 'fears' that remain in relation to the Protocol.[57] There is a danger that such fears about the Protocol's success or failure are expressed as a hesitance to make radical decisions and a defensiveness that becomes harsh positivism. In other words, the long and difficult history of the Protocol has the potential to drive its process and actors towards overwhelmingly precise norms and excessively exacting standards of review. The attention that has been given to the 'reasonableness' within the Optional Protocol is one example of where this has already begun.[58] However, there are also examples too. The CESCR's somewhat cautionary statement on the use of the maximum of available resource under the Protocol, adds additional steps of review by separating out cases of retrogression where resources are at issue,[59] and includes in its analysis the use of an 'adequacy' standard.[60] This is a new use of a term that had previously been a part of a typology assessing the nuances of State actions in relation to substantive rights. In this new form, the CESCR, seems to instead invoke it as an adjudicatory standard. It is in this regard that the complaints system might lead to an exclusion of the very micro groups it is meant

[51] Simmons (n 47) 71.

[52] ibid.

[53] Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8(4) Human Rights Law Review 617, 628.

[54] Such 'views do not have any binding effect, even in international law'; Andrew S Butler, 'Legal Aid Before Human Rights Treaty Monitoring Bodies' (2000) 49(2) International & Comparative Law Quarterly 360, 380.

[55] Simmons (n 47) 71.

[56] Martin Scheinin and Malcolm Langford, 'Evolution or Revolution? Extrapolating from the Experience of the Human Rights Committee' (2009) 27(1) Nordic Journal of Human Rights 97, 100.

[57] ibid 113; Stein Evju, 'Should Norway Ratify the Optional Protocol to the ICESCR? That Is the Question' (2009) 27(1) Nordic Journal of Human Rights 82, 82; Malcolm Langford, 'Closing the Gap? - An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 27(1) Nordic Journal of Human Rights 1, 24.

[58] See, eg, Porter (n 45).

[59] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 para 10.

[60] ibid paras 8, 12.

to respond to.[61] Where the 'jurisprudence' of the CESCR incorporates additional legalism, it will move further beyond the technical capacity of (non-legal) micro actors. The ability to acquire such expertise through one method or another will in turn depend on the financial resources of the group.[62]

Connected to this legalistic tendency, and potential barrier number three, is the predominance of *ex post* review built into the ICESCR. While there is the possibility for the CESCR to engage in *ex ante* review of forthcoming or mooted State policies in its Concluding Observations, for the most part the Committee concerns itself with reviewing events, policies and measures that are already, to some extent, history. Such an *ex post* approach – while vital – forces micro groups, the CESCR and others into an effectively responsive mode. While the CESCR's opportunities for pro-activism may be limited by the framework within which it is bound, micro groups are not similarly bound. Those micro groups are likely to focus their efforts and resources on preventing the violation they are concerned with rather than waiting for its indictment at a later point. It is predictable that this could lead them to by-pass or at least postpone their engagement with the legalism of the CESCR.

All of the barriers above – the focus of progressive realisation, the legalistic dangers of the Optional Protocol, and ex post review – are magnified in the case of current versions of the doctrine of non-retrogression. As has been well elaborated in previous chapters[63] the doctrine of non-retrogression takes a view that is similarly systemic and policy focussed as the progressive realisation obligation and combines this with numerous technical or legalistic conditions that must be fulfilled.[64] This approach to retrogression thus does little to address the doctrinal barriers to micro responsiveness and, indeed, contributes to them. This should be a serious concern for small groups of ESR advocates, as it paves the way for their exclusion (or at least their limited inclusion) within the CESCR's processes of decision making and development.

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[61] Bret Thiele, 'Optional Protocol to the ICESCR: An Opportunity for Strategic Litigation to Shape the Human Rights Framework' <http://globalinitiative-escr.org/optional-protocol-to-the-icescr-an-opportunity-for-strategic-litigation-to-shape-the-human-rights-framework/> accessed 20 September 2016.

[62] Butler (n 54) 361, 386. There is no availability of legal aid at the international level for Optional Protocol Complaints, and the provision of legal aid at the domestic level (at least in the context of the ICCPR) is 'very unlikely'; 'Human Rights Treaty Bodies - Individual Communications' (*Office of the High Commissioner for Human Rights*) <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> accessed 20 September 2016; Jane Connors and Markus Schmidt, 'United Nations' in Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2013) 381; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press 1994) 134.

[63] See, eg, Chapter 3, pp77ff.

[64] These are further examined in Chapter 8.

7.3.2. Institutional barriers

If the revised doctrine of non-retrogression is to open up the ICESCR system to responding more fully to micro actors, then reforms must go beyond the doctrinal barriers. To effectively respond to micro concerns, the range of institutional barriers faced by the CESCR must be addressed. The two principal barriers that are identified here are the resource difficulties faced by the UN treaty bodies, and the irregularity of States' reviews. While these might seem only tangentially connected to the doctrine of non-retrogression, they act as severe limitations on the CESCR's ability to engage in the required depth and at the necessary time with the requirements of the doctrine.

The CESCR and the other UN human rights treaty bodies face 'chronic' resource shortages,[65] a mere six hours with which to examine and question States on – at least – five years' worth of human rights issues,[66] and a 2500 word limit on their concluding reports.[67] This places pressure upon the Committee to focus its attention and prioritise its examination. Such pressures are likely to work against the Committee attempting to engage with more localised and perhaps more intricate issues of concern to grassroots organisations.

Even when a State faces its six-hour examination, the irregularity of that examination may allow the State to avoid effective scrutiny. While States are notionally subject to a review every five years, there was instead in the most recent crisis an average of five years between OECD States entering recession[68] and their Concluding Observations being released, with much longer in some cases.[69] This length of time allows States to advance substantially new policy directions and violate the ICESCR rights without ongoing review. Of course, when the State examination does occur, the CESCR is able to look back to violations previously committed, but where the context has changed or the policy has already been reversed this type of review will be largely redundant. Recent fiscal austerity policies provide a clear

[65] Michael O'Flaherty and Claire O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 Human Rights Law Review 141, 142.

[66] Navanethem Pillay, 'Strengthening the United Nations Human Rights Treaty Body System' (United Nations Human Rights Office of the High Commissioner 2012) 31.

[67] So as to minimize the cost of translation to all of the UN's working languages; ibid 55.

[68] Recessions are defined by a majority of economists as two consecutive quarters of negative growth (i.e. two, 3-month periods where a country's GDP was reduced on average); Roger A Arnold, *Economics* (Cengage Learning 2008) 151.

[69] An average of four years and 357 days between the beginning of recession for OECD States and the release of Concluding Observations by the CESCR. This figure excludes Luxembourg (which has yet to report) and Mexico (which has yet to have its report examined). See Appendix D for full details.

example of how a changing context can consign the CESCR's examinations to a status of historical interest.[70]

While, as noted above, the CESCR's planned schedule of State examinations envisages a five-yearly engagement, in practice this period is highly variable. Indeed, since 2013, as a temporary measure, the five-year period between examinations begins at the date of the last State dialogue with the CESCR, rather than the previously completely static five-year programme of deadlines.[71] At any one time the number of State reports submitted and requiring examination is relatively stable at around 45 reports.[72] The Committee has expressed its concern in strong terms that backlogs and resource constraints, 'no longer permit it to fully discharge its responsibilities under the [ICESCR] … in an efficient, effective and timely manner'.[73] Before and throughout the crisis, the body's budget meant that it was permitted to meet for full substantive sessions only twice per year (usually in April/May and in November).[74] This work has, since 2006, been assisted by pre-sessional working groups of Committee members which allow for the advance preparation of lists of issues.[75]

These pressures mean that even during 'normal' times there is a significant length of time between examinations, and the variable periodicity of Concluding Observations is undoubtedly a factor that affects the successful enforcement of the ICSECR rights. However, in the context of a crisis such as the most recent one there are additional issues that particularly inhibit the use of retrogression.

By following a strict schedule of examinations with no – or very limited – discretion, the CESCR leaves to chance the effectiveness of the primary State accountability mechanism. There are, of course, a complex web of factors that could make the timing of an examination 'good' or 'bad'. A forthcoming election or another issue dominating a national psyche could change the way in which the CESCR's comments are taken. However, one indicator of the appropriateness of an examination's timing is the period between the

[70] The Concluding Observations on Greece being released in 2015 after a long and tumultuous period of austerity and the involvement of international financial institutions where human rights input would have been beneficial; CESCR, *Concluding Observations: Greece* (UN Doc E/C12/1/Add97 2004).

[71] This change in approach, although entirely pragmatic, has the effect of allowing States to benefit from their own delays in cooperation as the clock is essentially reset after each examination. CESCR, 'Report on the Forty-Eighth and Forty-Ninth Sessions' UN Doc E/2013/22 para 46.

[72] CESCR, 'Report on the Fiftieth and Fifty-First Session' UN Doc E/2014/22 para 5 (Draft decision recommended for adoption by the Economic and Social Council).

[73] ibid paras 5, 6.

[74] ibid para 5.

[75] CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions' (2011) UN Doc E/2011/22 para 22.

arrival of recession and the next examination of that country.[76] By this measure, the CESCR's scheduled approach fails spectacularly. In fact, the countries that were some of the worst-hit by the crisis (Ireland, Greece and Italy) were also the countries that had the longest period between crisis and examination.[77] It took around eight years and four months in each of these cases. By contrast, countries such as Sweden and Hungary were examined in around 5 months and 13 months respectively following the beginning of their recessionary periods. Neither are these examples outliers; the large average gap of around five years for OECD countries between entering recession and the release of Concluding Observations underscores the need for a reformed, and more creative use of the CESCR's time.

While more than eight years of unexamined post-recession ESR developments is self-evidently too long a period to ensure effective and contemporaneous accountability, there is another side to such arbitrary methods of timing State examinations. The UK, another prominent recession-hit country, was examined just over a year following its entrance into recession. Yet this, it transpired, was before the worst of the effects (of the crisis and the responses to it) would be felt in the country. Indeed, while the Concluding Observations from that examination do mention the 'economic downturn' in relation to unemployment, there is no serious foreboding expressed or interrogation of the issues present.[78] In this situation, and working from a State Report submitted prior to the UK's recession[79] (with additional information in the UK's response to the List of Issues in March 2009[80]), there were significant constraints upon the CESCR. In effect, this fortuitous timing (for the UK State) has bought the country and the three governments which have held office, an absence of accountability for around seven years of recession and austerity. Such arbitrary timing of the CESCR's examinations, with no possibility for re-scheduling, pose a significant barrier to the effective use of the system by micro groups.

[76] This is not a perfect measure for a number of reasons. Due to the definition of a recession, six months of recession will have occurred before there can be an official recognition of it. This means that there is in any case six months before the CESCR and other bodies could realistically react. The other limitation of this measure is attached to the meaning of recession. It being an abstract concept, there will be very different on-the-ground effects that flow from recession. In some cases, a recession might not pose any threat to ESR protection and a special examination by the CESCR would be extraneous.

[77] All calculations in Appendix D. It should be noted that there are a range of reasons behind delayed examinations, including many reasons not attributable to the CESCR such as delayed State reporting.

[78] CESCR, *Concluding Observations: United Kingdom* (UN Doc E/C12/GBR/CO/5 2009) para 20.

[79] *State Party Report under the International Covenant on Economic, Social and Cultural Rights: United Kingdom* (31/1/2008; UN Doc E/C12/GBR/5 2008). The UK officially entered into recession in the second quarter of 2008, but this would not be officially declared until 23/1/2009; 'UK in Recession as Economy Slides' *BBC* (23 January 2009) <http://news.bbc.co.uk/1/hi/business/7846266.stm> accessed 20 September 2016.

[80] *Replies by the Government of the United Kingdom of Great Britain and Northern Ireland to the List of Issues* (UN Doc E/C12/GBR/Q/5/Add1 2009).

Neither would a more flexible approach be as practically difficult as might be imagined. While, most famously, the financial, bank-based crisis which struck the USA in late 2007 cascaded around the world to cause economic recessions in numerous countries, these effects struck different parts of the world at different times. While a sudden deluge of demands for examinations might be imagined, if the CESCR continued its *ex post* approach the variation in when effects are seen in different countries would mean a natural staggering. As a crisis 'rolls out' at different rates it would provide a realistic window for the CESCR to reorder its schedule. Even if the CESCR was to move towards greater *ex ante* review as suggested above, the Committee would still be able prioritise the review of countries expected to be most susceptible to the effects of a given crisis. Given the severe resource constraints upon the CESCR, this ability to work within its existing resources is, of course, central to any reform suggestion and is something that is attempted within the (re)constructed doctrine.[81]

7.3.3. Accentuation through micro groups' characteristics

The concerns noted above – the doctrinal and institutional limitations of the ICESCR and the Committee – are likely to have broad impacts on a wide range of State and non-state actors. However, there are additional features of micro groups which intensify the effects felt by these smaller groups. In particular, where such groups include the characteristics of informality, under-resourcing and shorter-termism it may accentuate the barriers that exist to engagement with the CESCR.

For example, literature on social movements notes the complexities that exist in sustaining these movements through time, with the direction of such groups being significantly influenced by the prevailing social environment.[82] Faced with hostile political environments, internal conflicts, or co-option into a larger institution, the voice of the micro group can be lost.[83] The implication of this in the context of the barriers to ICESCR engagement is that the longer the period before a country is examined the greater the likelihood becomes of interested groups being created and mothballed. This same difficulty is not felt to the same degree by larger, more stable institutions (such as international NGOs), which can largely sustain themselves between State examinations despite facing hostile environments.

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[81] CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions' (n 75) paras 1, 32; Pillay (n 66) 31.

[82] Donatella Della Porta, *Social Movements in Times of Austerity: Bringing Capitalism Back into Protest Analysis* (Polity 2015) 159; Gould (n 17) 254ff.

[83] Jeff Goodwin and James M Jasper, 'Why Do Movements Decline?' in Jeff Goodwin and James M Jasper (eds), *The Social Movements Reader: Cases and Concepts* (3rd edn, Wiley-Blackwell 2014) 343.

While these larger bodies undoubtedly face significant challenges in resourcing themselves, especially during a recessionary period when membership and government funding may be scarce,[84] the challenge will be less severe than for newly established micro groups. In particular, groups seeking resources will have to invest significant time in soliciting them and such efforts will require 'some minimal form of organization' which some micro groups may not possess.[85] Despite the low financial barriers to accessing the ICESCR processes, the need for at least some legal understanding will require such groups to possess resources in-cash or in-kind.

This array of difficulties flowing from either the ICESCR system, the Covenant itself, or the makeup of micro groups reduce the ability for the system to hear the voices and concerns of organic, new and/or radical voices from beyond the established human rights 'community'. As discussed in the following section, this removes a range of benefits that might result from such engagements.

7.4. Centrality of Micro Concerns

It can be argued that the CESCR's existing levels of engagement with civil society are adequate and not indeed of improvement. However, this is to ignore the barriers faced by certain types of (under-resourced, *ad* hoc) micro groups. When the specific features of micro groups are considered, and their potential for unique contributions is appreciated, the need for a re-centring of some of the CESCR's processes on these groups' concerns becomes pressing. The benefits that might be realised through a fuller engagement with micro concerns can broadly be divided into expanded capacity and assistance in shaping the ESR normative agenda. Each of these areas are explored in depth below.

7.4.1. Capacity

Given the under-resourcing of the international bodies tasked with furthering ESR standards,[86] and the role for domestic enforcement that is acknowledged by some as crucial to the realisation of international standards on-the-ground,[87] capitalising on the capacities of the widest possible range of actors is necessary. While they may be cash poor, micro

[84] See, eg, the closure of the longstanding NGO InterRights; 'InterRights' (9 January 2016) <http://www.interights.org/home/index.html> accessed 20 September 2016.

[85] John D McCarthy and Mayer N Zald, 'Social Movement Organizations' in Jeff Goodwin and James M Jasper (eds), *The Social Movements Reader: Cases and Concepts* (3rd edn, Wiley-Blackwell 2014) 161.

[86] Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6(1) Human Rights Law Review 27, 37 (quoting Bayefsky), 50.

[87] Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009) chapter 4.

groups can bring with them resources of an 'organisational', 'moral, material, informational, and human' nature.[88] These resources might be derived from, and embedded within communities in ways that would be challenging for human rights systems to replicate.[89]

How, then, might the ICESCR system make use of these resources? There are two challenges here. The first of these is the set of barriers elaborated upon in the previous section; the ICESCR is not currently well positioned to responsively attract engagement from micro groups. The second is the non-fungibility of many of the resources that exist at the micro level. Resources in a number of forms are contributed in a particular context in order to respond in a particular way to a particular issue.[90] Seeking to simply transfer the resources into a struggle for ESR realisation is unlikely to be successful as the form of the struggle will not have the same resonance those who were prepared to contribute resources to the micro group. As such, in order to capitalise on the resources of such groups there will need to be an active accommodation of appropriate micro group concerns by the ICESCR system.

Some might reject the utilitarianism of such an argument, seeing it as a threat to the health of the rights regime. Such concerns can be set aside on a number of bases. First, by focussing on the legitimacy of the micro group as a human rights actor it can be argued that the substance of the system benefits from such engagements. Of course, as discussed above, not all micro groups will be legitimate human rights actors, but where they have aims that can be linked to human rights and a basis in a democratic collective of individuals, their inclusion moves beyond pure instrumentalism. Secondly, a focus on the makeup of the CESCR can help demonstrate the need for such diverse and particularly micro concerns to be heard. The institutional tendencies of the human rights system as legalised, professionalised, and internationalised are far from neutral or inherently 'good' values[91] and themselves lead to the human rights system taking on a particular normative inflexion. If, as Stammers encourages us to, we see both the work of elites and social movements as 'creative' agents, micro concerns can be seen as exerting an entirely appropriate influence.[92]

7.4.2. Normative Shaping

[88] David A Snow, Sarah A Soule and Hanspeter Kriesi, *The Blackwell Companion to Social Movements* (John Wiley & Sons 2008) 125.

[89] McCarthy and Zald (n 85) 161–164.

[90] Snow, Soule and Kriesi (n 88) 129ff.

[91] Melucci in Stammers (n 50) 163.

[92] ibid 162.

Beyond the extra enforcement capacity that might be achieved through a liaison with micro groups, there are a number of benefits that can result from allowing such groups a more significant role in shaping the normative directions of the ESR framework. There is an obvious tension implicit in involving micro groups in such a capacity; at what point does the ICESCR system stop being a human rights system and turn into a simple vehicle for localised and non-legal concerns? However, the concern of the international human rights system with the individual and her dignity, can clearly provide a foundation for at least some further engagement with micro groups. These groups, insofar as they have a plural membership, can ensure the international system of norms is better connected to the individuals it claims to represent.[93] In this sense there is both a symbolic and substantive benefit to engaging with micro groups formed of individuals.

The 'outputs' of micro groups – known in social movement theory as the 'expressive dimension' – can have positive effects in shaping 'norms, values, [and] identities'.[94] They do this, according to Stammers, through affective and normative dimensions.[95] Both of these dimensions can add to the work of ESR adjudication, development and enforcements.[96] While the system might be more familiar with claims for normative change (the primary level on which the closely affiliated academic field operates), the affective can contribute an urgency and a grounding for the system. In particular, critics of human rights' legalisation might recognise a redeeming potential for the system through a better incorporation of affective elements.

There are several decisive areas where micro concerns from around the world might shape the CESCR's work. For example, the voices of micro groups could help bring 'new' issues onto the CESCR's agenda. At its most significant, this might help determine the topics for Days of General Discussion or the issues on which General Comments are developed. However, at a lower level these voices might act as a signal to the CESCR of new issues of significance that require their attention through proactive monitoring, State examinations, Statements or Letters. The most recent crisis and its associated austerity measures are an example of where the CESCR might have seen a greater range of impacts and local concerns more clearly and at an earlier point.

[93] ibid 166.

[94] ibid 164.

[95] ibid.

[96] ibid 177.

Besides the contribution of new issues, micro groups might also usefully assist the Committee in setting its priorities as between existing issues. They could do this by contributing both a sense of the magnitude or severity of an issue, and separately its importance to the individuals the group purports to represent. This might give the CESCR a basis for making difficult choices between two or more policies that are negatively affecting the right to housing, for example. Whether the cost, quality, availability or type of tenure is seen as the priority issue by micro groups could, for example, usefully inform the CESCR's view on its own priorities.

Finally, active engagement with micro groups might be used to inform the Committee's proposed response to a rights issue. While is it important for the CESCR to be seen as independent, and there must therefore be a limit to the influence held by micro groups, this influence can again be seen in a similar light to State influence over the Committee. Micro groups could be seen as shaping the responses of the CESCR in much the same way as State reactions (practically and politically) act to set boundaries upon the potential responses open to the Committee (treaty bodies are not known for their calls to reinvent national democratic structures or economic systems). These opposing influences would likely occur at opposing ends of the scale. Whereas States are likely to contribute a conservative impulse, micro groups might contribute a more 'radical' impulse with the groups able to indicate a base line solution below which an acceptable CESCR solution should not go.

Moves to incorporate micro concerns more strongly might reasonably be met with unease. After all, inviting unrestrained outsiders into the ICESCR processes might upset a fine diplomatic balance that enables at least some State accountability. However, there is significant untapped potential in these many groups. It remains the case that a majority of groups – be they formalised NGOs, or more informal political or campaign groupings – are not engaged in the use of the international human rights system. This means there are an unexplored mass of benefits in terms of capacity and normative shaping that the ESR framework can profit from. However, it is clear that given the range of barriers that exist to prevent full micro responsiveness, a number of modifications to the ICESCR system are required. Some of these have been discussed above, such as caution about the over-legalisation of the Optional Protocol, and the need for greater flexibility in the timing of State examinations. However, the task of considering where the retrogression, the ICESCR and the Committee might be more effective in this regard is taken up in full in the following section. The section particularly focusses on the role the (re)constructed retrogression can play as a vehicle for such engagement.

7.5. Improved Approaches

There are a number of ways that the CESCR's work could become more engaged with the concerns of micro actors. Inevitably, the available options range from the straightforwardly implementable to those requiring significant reforms. However, of particular interest is the role that the doctrine of non-retrogression can play in shifting the CESCR's emphasis in a more micro-friendly direction.

The repurposing of the doctrine of retrogression argued for in chapter 4 was grounded in the aim of supporting the progressive realisation obligation, while striking a balance between internal coherence and innovation. Recalling the suggested new formulation of retrogression:

> as an action, inaction or contribution to a trend which is likely to negatively affect the progressive realisation of individuals' ICESCR rights.[97]

This formulation provides a number of cues for new thinking on micro engagement. There is of course, the aim of promoting progressive realisation through innovations. While most obviously these innovations can come through doctrinal changes, there is also room for a broader conception in this regard. Here we might think of the innovations to retrogression that might be more accommodating to the affective or emotion work of micro groups. This might occur quite simply, through the use by the Committee of individual stories of retrogression and its impacts. This is encouraged by the (re)construction's explicit focus on the experiences of individuals. Although this could in theory occur in Concluding Observations, General Comments and Statements it is perhaps more likely that they are included beyond these more formal materials in discussions and press releases. Even these more limited changes to practice would capitalise upon this aspect of micro group work, in addition to boosting the effectiveness of the CESCR's work as an advocacy tool.[98]

The text of the proposed (re)constructed retrogression additionally broadens the focus of the doctrine to include a broader range of State activities within its scope. By including all of State actions, inactions and contributions to trends, the (re)constructed doctrine removes a significant barrier to micro groups. Rather than needing to demonstrate a particular action (and, under the current version of retrogression, a deliberate one at that), micro groups would simply be able to identify negative outcomes and some State connection to them

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[97] Chapter 4, p118.

[98] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999) 14.

according to the (re)construction. This is key in terms of reducing the barriers to these groups' participation as it is more inclusive of their experiences, however it also allows the CESCR to receive a broader range of information and concerns from the grassroots level.

In another sense, the work of 'sky scanning' for potential threats can largely be taken care of by a plurality of well-connected micro groups. Such groups could act as a barometer in the context of retrogression, allowing the CESCR to react more promptly to negative impacts being experienced before they become large-scale rights crises. One example of this might be the experience of the third sector through recent austerity policies. Many organisations expressed deep concerns about the future sources of funding for their services quickly after austerity policies were enacted,[99] yet it was years before these concerns received formalised attention. Opening the doctrine of retrogression to such input allows it to adopt an explicitly *ex ante* approach that identifies negative trends and a human rights-based solution to them at an earlier stage.

Further, while the need for demonstrations of the systematic effects of a State policy noted above would be difficult for a small-scale group to undertake, the revised formulation of retrogression removes such a systematic quality. By focussing on the likely impacts upon individuals – through the phrase 'negatively affect the progressive realisation of individuals' ICESCR rights' – the revised retrogression paves the way for the concerns of even the smallest micro groups to be acted upon. This is one key way in which the substance of the Committee's work can be guarded against undue abstraction, a problem that has been particularly acute in the case of retrogression.

In addition to these retrogression-concentrated changes, there are a number of other more operational ways in which the CESCR could further its engagement with the micro level. One of these simply capitalises on an already successful link between the UN human rights institutions and grass roots activists. The Special Procedures of the Human Rights Council, although far from perfect, regularly undertake country visits and discuss issues of concern with a range of actors, including micro ones.[100] As such, the Committee has a pre-existing source of well-sourced information on the concerns of at least some micro-groups. While the CESCR and the Special Procedures are clearly different institutions and will have

[99] Mary-Ann Stephenson and James Harrison, 'Unravelling Equality?: A Human Rights and Equality Impact Assessment of the Public Spending Cuts on Women in Coventry.' (2011) 52ff <https://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/publications/unravelling_equality_full.pdf> accessed 20 September 2016.

[100] Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) The International Journal of Human Rights 299.

different mandates,[101] the connection between the two could be strengthened. The CESCR could, for example make further references to the work of the Special Procedures in its Concluding Observations, re-emphasising issues of concern and highlighting instances where access to a country has been refused to a Rapporteur.

Another complement to this information gathering – and a way to improve the use of retrogression – is through soliciting a wider range of shadow reports. There is already some good practice in this regard with some State examinations being aided by numerous shadow reports. Invariably, however, the number of reports submitted is a fraction of the total number of groups that are working on issues of concern to the Committee. Encouraging less formal or 'fact-finding' submissions to the CESCR would allow micro groups to contribute the information and understanding that they retain. Such an approach would also allow the much larger pool of groups without a knowledge of the ICSECR legal standards to contribute effectively.

The contents of the Optional Protocol also promise new avenues for actively engaging micro groups. The use of third party interveners in individual complaints will enhance the role of such groups and can benefit the quality of the Committee's jurisprudence. The Committee should accept and encourage a wide variety of interventions in relation to individual communications. Importantly these should include interventions which are less legally literate but which can contribute context or specialist understanding. In addition, when producing its views, the CESCR should avoid an excessively legalistic direction that could act to exclude all but the most specialist legal actors.

The inquiry procedure in the Optional Protocol provides a further opportunity for the CESCR to seek out the views of micro groups. Although limited, in the same way as individual complaints, to those few States that have ratified the Protocol, the coverage of the procedure may expand in future. The threshold for a triggering of the procedure is high, requiring evidence of 'grave or systematic violations'.[102] However the mechanism for triggering this additional attention is open and flexible. The CESCR need only receive 'reliable information' indicating such a severe situation and such information can readily be provided by micro groups. As such, the inquiry procedure provides a way for micro group

[101] For a list of the mandates of the UN Special Procedures see; Office of the High Commissoner for Human Rights, 'Thematic Mandates' <http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM> accessed 20 September 2016.

[102] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (n 45) art 11(2).

concerns to empower the CESCR to move to 'urgently'[103] to assess a concerning situation. In assessing such a situation there is a further opportunity for engagement with micro actors.

There are also a range of other more demanding reforms that could be enacted in order to better facilitate this relationship. Some of these would simply require an adaptation of current practices, while some would require more substantial reform. For example, the CESCR could move to a more fluid schedule of State examinations that would allow a more responsive approach to ESR violations. A scheduling change might even be triggered by information of specific issues such a retrogression or a violation of the minimum core. Elsewhere, greater advice and technical support might be provided by the Committee or its secretariat to those micro groups who wish to engage with them. Such support might help bridge the gap between the legal resources of micro groups and the CESCR's specific processes and standards.

There are, too, more fundamental reforms that might be pursued. Greater resources for the CESCR's work would allow the body to be more proactive in encouraging crucial micro engagement. Or, through changes to the Committee's working methods, micro groups and affected individuals might take on a more central role in the State examination process.

There is significant value that can be added by micro engagement and there are multiple areas where the Committee might make improvements to its practice. A reformed doctrine of non-retrogression could work as one important vehicle for opening the ICESCR system up to greater engagement with micro groups. Through employing the emotions work of micro groups and adopting a more flexible and *ex ante* approach, the doctrine of non-retrogression could shift away from the current approach. Combined with other aspects such as the individual complaints mechanism, the inquiry procedure and some more demanding reforms, there is clear potential for more effective practice in this area.

7.6. Conclusions

It is clear that defining 'micro groups' and 'engagement' in this context is a challenging task. There are a range of definitions that identify, with varying degrees of success, the type of actor that we are concerned with here. The meaning given to micro groups for the purposes of the analysis here combined a number of definitions and stressed the groups' construction of themselves and the inclusion of at least some of subaltern characteristics. This generally led to a de-emphasising of the structural and organisational characteristics of the groups. In

[103] ibid art 11(3).

addition, 'engagement' was also given a flexible definition in recognition of the context-dependence of the term. While it is clear that engagement with some groups is clearly not required, in more finely balanced cases it was argued that the ICESCR carves out a role for such groups (especially in the enforcement context).

The chapter discussed the significant doctrinal and institutional barriers that currently exist to successful micro engagement. These included the high level focus of progressive realisation, fears surrounding the Optional Protocol, the predominance of *ex post* review, resource shortages and the scheduling of State examinations. It was also argued that some of the characteristics of micro groups can serve to magnify the impact of these barriers.

Yet, despite the barriers, the benefits of micro engagement are clear. The chapter argued that the ICESCR system could be enhanced by the capacity brought by micro groups' participation. Beyond this more instrumental reason for improving micro engagement, it was also argued that there were significant substantive benefits to be had by allowing micro actors to be involved in shaping the normative direction and choices of the CESCR.

Finally, the chapter addressed how the (re)constructed doctrine could lead to changes to the current practices of the ICESCR system in order to facilitate more effective micro engagement. Changes to the doctrine of non-retrogression are central to these adaptations and it was argued that the proposed (re)construction can act to counteract a number of the current barriers to micro groups. This might be done by mitigating the sometimes high-level progressive realisation obligation, and going beyond the traditional language of the CESCR's outputs to include individual stories of retrogression and its impacts. The (re)construction also moves away from the need for overly legalistic approaches, and allows for greater *ex ante* review.

In these and other areas, changes to the formulation of retrogression could be a central part of improving responsiveness to the concerns of micro groups. In this sense, then, the (re)construction of retrogression would provide a successful avenue to better realisation of the Covenant.

Chapter 8

Retrogression in Applied Perspective

8.1. Introduction

While the CESCR's versions of the doctrine of non-retrogression are confused and lacking in purpose,[1] a key deficiency also lies in the impracticability of the doctrine. There are significant challenges in assessing whether and what type of retrogression exists. The multiple steps required in order to successfully show the existence of retrogression (each of which can be a significant challenge to demonstrate) have made discussions of retrogression a rarity,[2] and conclusive findings all but absent.[3] Added to these multiple levels are difficulties with terminology, and pervasive vagueness about the triggers and scope of application of the doctrine.

It follows then, that a (re)constructed doctrine of non-retrogression must make advances in these practical matters as much as in the more attention-grabbing areas of macro policy and crisis. The fourth and final stress-test of the (re)constructed doctrine is therefore its practicability. It is implicit in the preceding chapters that task of ensuring effective implementation of the doctrine of non-retrogression is a significant one. It is also clear that without improved implementation, many of the improvements discussed in relation to structural, crisis, and micro issues will fail.

The aim of this chapter is therefore to dig deep into the logic and practical dynamics of non-retrogression, in order to understand the implementation difficulties. Each of these identified practical issues is then addressed and compared to how the (re)constructed doctrine might approach the matter. The selection of challenges is not comprehensive, but instead selects those matters that arise most often. It begins with the issue of terminology, making a plea for a rigorous and consistent use of some of the terms that are central to the doctrine's functioning. Following this, the process that must be followed in order to demonstrate retrogression is discussed, including a particular focus on burdens of proof. The inconsistencies in these burdens is scrutinised. The chapter then touches briefly on the issue of how the examinations of non-retrogression are timed and triggered, in an attempt to deliver clarity about how assessments of retrogression are to be initiated. The section

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[1] See especially Chapter 3.

[2] In the 15-year period from the year 2000, retrogression was discussed in just 4% of Concluding Observations (this figure moves to 9% if mentions of the 2012 Letter to States, which was heavily focussed on retrogression, are included).

[3] For some of the CESCR's firmer findings of retrogression, see; CESCR, 'Report on the Seventh Session' (1993) UN Doc E/1993/22 para 152 (Concluding Observations on Hungary); CESCR, 'Report on the Tenth and Eleventh Sessions' UN Doc E/1995/22 para 181 (Concluding Observations on Mauritius); CESCR, 'Report on the Thirty-Sixth and Thirty-Seventh Sessions' UN Doc E/2007/22 para 190 (Concluding Observations on Canada).

also devotes attention to identifying the exact target of the doctrine. This draws heavily on the work of Nolan, Lusiani and Courtis to show that the empirical/ normative division can be both analytically useful and complex. At each stage, the differences made by the (re)constructed retrogression will be highlighted and discussed.

The challenges are diverse in nature, ranging from those that would be traditionally thought of as 'legal', such as those relating to proof, to those that are at best procedural and could even be seen as presentational, such as the inconsistencies that exist across the multiple versions of the doctrine.

Together these discussions move beyond some of the more strategic challenges faced by the doctrine that have been discussed in previous chapters, and towards the more operational issues faced in the doctrine's implementation. As a whole, the chapter emphasises the need for greater consistency with the construction and use of the doctrine (showing, for example, a multitude of burdens of proof and terms for the doctrine). It also demonstrates that without attention to the operational detail, retrogression – in whatever form – will fail to be fully utilised.

8.2. Terminology

The choice and order of words seems an unlikely subject matter for a human rights centred discussion. Yet, a significant degree of ambiguity in the writing of all actors in this area means clarification is needed. This ambiguity is surprising given the dominance of the human rights arena by lawyers who are stereotypically fastidious with definitions and semantic accuracy. And, '[l]anguage matters when it comes to delineating international human rights obligations'.[4] There are three terminological concerns selected for attention here, but many more could be similarly scrutinised.[5] These are (in order); the non-naming of retrogression, a changeable name, and the meaning of 'deliberateness'.

Ironically the first of the terminological problems relates to an *absence* of terminology. As has been highlighted by Nolan, the CESCR has failed in high-profile examples to use the word retrogression or even regressive, instead opting to describe the situation in terms of a 'step backwards'.[6] While replacing the term retrogressive with the backwardness concept

[4] Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights* (Hart 2013) 52.

[5] Other semantic/definitional issues arise *inter alia* in respect of; 'discretion', 'guideposts', 'alternatives', 'carefully considered'. There is some discussion above of the terms 'non', 'prohibition', 'measure' and 'step' in chapter 3, pp74-77.

[6] Nolan (n 4) 51; citing CESCR, *Concluding Observations: Spain* (UN Doc E/C12/ESP/CO/5 2012).

would be somewhat more accessible, such a change of language would need to be made explicitly. As it is, the CESCR's uses of 'backwards steps' language amounts to a tangential reference to retrogression that, in the context of the country concerned, serves to soften their finding by divorcing it from the hard legal doctrine. New word choices such as this also serve to further the complexity of non-retrogression. Does the doctrine of non-retrogression only relate to backwardness? What is the meaning of a 'step'? Do the same justificatory criteria apply to backwards steps as to full retrogression?

Even where the Committee is more explicit about its meaning, the terms used to express that meaning are varied. There are, as discussed above, various different uses of the terms regression, retrogressive, and retrogression.[7] This is clearly causing confusion, with State reports using the terms incorrectly and giving them a non-legal or mathematical meaning, for example.[8]

Further, there is currently an interchangeable use of the terms mechanism, doctrine and obligation to describe the bundle of duties encapsulated within retrogression. It was argued that there was a greater degree of solidity and separatism to be had from the use of 'doctrine' rather than 'mechanism', suggesting that retrogression is a stand-alone entity.[9] This, it was argued, might be more appropriate where retrogression was seen as having separate purposes to other obligations (especially progressive realisation). Given the close connection of the (re)constructed retrogression to progressive realisation, an implication that it sits independently would be counterproductive. However, using a term such as 'duty' or 'obligation' might imply something more neutral and overcome this difficulty.

Another terminological issue relates to the ambiguity surrounding the subject of 'deliberateness'. The question is posed; must the *measure* or the *retrogression* be deliberate? There are two potential meanings when 'deliberate' is used in connection to 'retrogressive'. Unhelpfully, each of these meanings can be encapsulated in similar words. These meanings are (in order of ascending State culpability);

1. Deliberate retrogressive measure:	That the measure (which happens to be retrogressive) was deliberate (i.e. that the measure was deliberate, but the retrogressive result was not)
2. Deliberately retrogressive measure:	That the retrogressive nature of the measure was deliberate (i.e. that the measure was deliberately constructed to be retrogressive)

[7] Chapter 3, At pp74-77.

[8] Chapter 3, nn73 and and 74.

[9] Chapter 3, At pp74-77.

Leaving aside the exact terms used by authors,[10] there is some agreement that the second meaning above is the correct one. Sepúlveda implies agreement with the second of these definitions when she refers to a step backward as the result of an 'intentional decision' (i.e. she sees the decision not just to take a step, but to take a step *backwards*, as the result of an intentional or deliberate process).[11] O'Connell et al (writing in 2014),[12] Nolan and Dutschke (writing in 2010) [13] and Nolan et al (writing in 2014)[14] cite this passage of Sepúlveda's analysis approvingly. Elsewhere, Sepúlveda Carmona mirrors the CESCR's work more explicitly, where it emphasises the range of steps to be taken before enacting a retrogressive measure and thus pointing towards the second definition,[15] as discussed below.[16] Many authors do not endorse either position.

There is also a tension here in the CESCR's work. As Nolan notes, 'the Committee has never addressed the difference between retrogressive measures that are deliberate and those that are not'.[17] Far less has the Committee given guidance on what it is that the State must not do deliberately. The most obvious reading of the CESCR's work is the second of the two definitions (that the retrogressive nature must be deliberate). This is the approach of the Limburg Principles[18] and in addition, some of the CESCR's justificatory criteria sit uneasily alongside an assessment of whether measures were deliberately taken or not (the first definition). The appraisal of whether a measure was accidental or deliberate is of an entirely different magnitude to an assessment whether the State had carefully considered the measure and had had the impacts independent assessed.[19] The latter criteria would seem to answer the deliberateness question (i.e. if the State had carefully considered the measure, it is clearly deliberate). Yet the two criteria are presented in competition to each other in the doctrine's criteria; deliberateness is seen as bad, while careful consideration is seen as good.

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[10] The terms 'deliberate/ly retrogressive measures' are used interchangeably in the literature. See, eg, Independent Expert on the question of human rights and extreme poverty, *Rights-Based Approach to Recovery* (UN Doc A/HRC/17/34 2011) para 18; Aoife Nolan and Mira Dutschke, 'Article 2 (1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) 3 European Human Rights Law Review 280, 282; Christian Courtis, 'Standards to Make ESC Rights Justiciable: A Summary Exploration' (2009) 2(4) Erasmus Law Review 379, 393.

[11] M Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 323.

[12] Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014) 70.

[13] Nolan and Dutschke (n 10) 282; this relevant passage of Nolan and Dutschke is cited in Nolan (n 4) 46.

[14] Aoife Nolan, Nicholas J Lusiani and Christian Courtis, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 133.

[15] Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) 26–27.

[16] Below at pp214-217.

[17] Nolan (n 4) 47.

[18] 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) UN Doc E/CN.4/1987/17 para 72. As the work of experts in the field these principles are influential but not binding. Sepúlveda's reminder of their age and the array of developments since then is also valuable; Sepúlveda (n 11) 19.

[19] CESCR, *General Comment 19: The Right to Social Security (Art. 9 of the Covenant)* (UN Doc E/C12/GC/19 2007) para 42.

Yet according to this more prevalent second definition, there is a danger that the State might escape duties where activity can be defined as a 'measure' but not as deliberately taken one. When 'measure' is defined broadly (as the CESCR does to include 'legislation, strategies, policies and programmes'),[20] thinking of examples of non-deliberate such measures is difficult. One might suggest that a relatively automated, technical and/or low level measure taken without the knowledge or deliberation of the 'State' might not be deliberate. However, this engages the more substantive and complex question of what constitutes 'State deliberateness'.

On the one hand, we might take the personification of the State to an extreme and discuss the deliberateness of its actions in much the same way the intention of individuals is discussed in domestic law. At the other end, however, such a treatment ignores the multifaceted nature of States which have at their core multiple policy processes, many divergent intentions, and which do not behave as individuals do.

Even if 'deliberateness' can be conceptually resolved with the nature of States' functioning, there is the more pressing issue about how – and what type of – deliberateness is to be shown. While the CESCR seems to have opted for requiring the retrogressive nature of the measure to be deliberate, there is a gulf of culpability between the two. The first definition merely excuses States for bad measures enacted accidentally, while the second definition opens up a route for States to escape legal responsibility for considered measures that damage rights. This is because, under the second definition, the State's deliberate intention to damage rights would have to be shown.

Finding evidence of such malign intent in a State's functioning would be extremely difficult. While it is relatively easy to demonstrate the deliberateness with which a State enacted a measure (through a governmental statement, for example), it is altogether more difficult to show that the State deliberately harmed the rights of its citizenry. This creates a serious gulf between each definition. Proving that a State deliberately enacted a measure is one thing, but proving that it intended that a measure would damage rights is an altogether more significant task. Operating under meaning two would allow States to simply claim that the retrogressive nature of the measure was unintended and thus escape their obligations. Significantly, the burden of proof relating to deliberateness is one of the few criteria that has been left open in this way and will likely fall to the Committee or claimants to

[20] ibid 67.

demonstrate.[21]

In all of these terminological issues, the need for consistency and clarity should guide the CESCR's activities. There are marginal choices to be made as between various terms, but whatever route is chosen it should be adhered to consistently. This will aid the practical application of retrogression in a greater number of situations and will ensure the full meaning and force of the doctrine is applied.

The (re)constructed doctrine, or indeed any fully reformed doctrine of non-retrogression, offers the opportunity for a mass clarification of the terminology used. It also reduces the number of terms of art, and in so doing minimises the chances for such conflicts of language to arise. Finally, it is linked to the language of progressive realisation, meaning a second parallel set of terms does not need to be used to define similar ideas.

8.3. Proving Retrogression

The process of demonstrating retrogression depends greatly on the version of the doctrine that is followed. It has been argued in earlier chapters that there is a lack of common grounding and purpose across the various doctrines,[22] however, it can be seen that the detail of the doctrines' application is inconsistent also. The CESCR has done little to discourage such conflicts between its doctrines either implicitly through its restatements of the terms of retrogression, or explicitly through an explanatory note. Concluding Observations are similarly unhelpful in understanding the dynamics of the doctrine's application, with the CESCR failing to ever rigorously apply the doctrine to country situations. This inconsistency is one part of the difficulty in concretely proving retrogression. The other significant element is the lack of clarity surrounding the burdens of proof that are required by the doctrine. The CESCR variously notes that the 'burden of proving' retrogression is upon states, that there is a 'strong presumption' against retrogression, that retrogression is 'prohibited', that 'retrogressive measures should in principle not be taken', but also that they can be 'inevitable'.[23] Besides this array of standards, is the requirement of article 8(4) of the Optional Protocol which obliges the CESCR to consider the reasonableness of the State's actions when considering complaints. The balancing of these standards is to take place while 'bearing in mind' that States are entitled to pursue the ICESCR rights in a range of ways (thereby giving a sort-of margin of

[21] See below at section 8.3..

[22] See Chapters 3 and 4.

[23] CESCR, *General Comment 18: The Right to Work (Art 6 of the Covenant)* (UN Doc E/C12/GC/18 2005) para 21; CESCR, *General Comment 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)* (UN Doc E/C12/GC/22 2016) para 38.

appreciation to the State[24]). The substantial difficulties in unpicking the CESCR's meaning(s) will be discussed towards the end of this section. First, however, the more general inconsistencies in the doctrines will be examined.

A reasonable pair of examples representing the two poles of the level and variance of complexity in the process of showing the existence of an impermissible retrogressive measure, are General Comment 3 and General Comment 19. Following General Comment 3, there are ostensibly five aspects that must be shown in order to successful demonstrate impermissible retrogression.[25] The responsibility for showing all of these aspects is an open question as the Comment does not specify who must prove each step. It might be surmised that, in practice, under General Comment 3 this responsibility will fall to the 'claimant' (whether an individual or NGO) that is invested in showing the breach. In some instances, such demonstrations will be relatively straightforward where, for example, deliberateness can be shown through government statements and/or legislation. Yet others, requiring proof that there was not 'careful consideration', will be substantially more difficult.

[24] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) UN Doc E/C.12/2007/1 paras 11, 12; Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW; Bruce Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27(1) Nordic Journal of Human Rights 39; on how 'reasonableness' and the margin might interact see, Aoife Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21(2) The International Journal of Children's Rights 248, 277.

[25] See Figure 8.

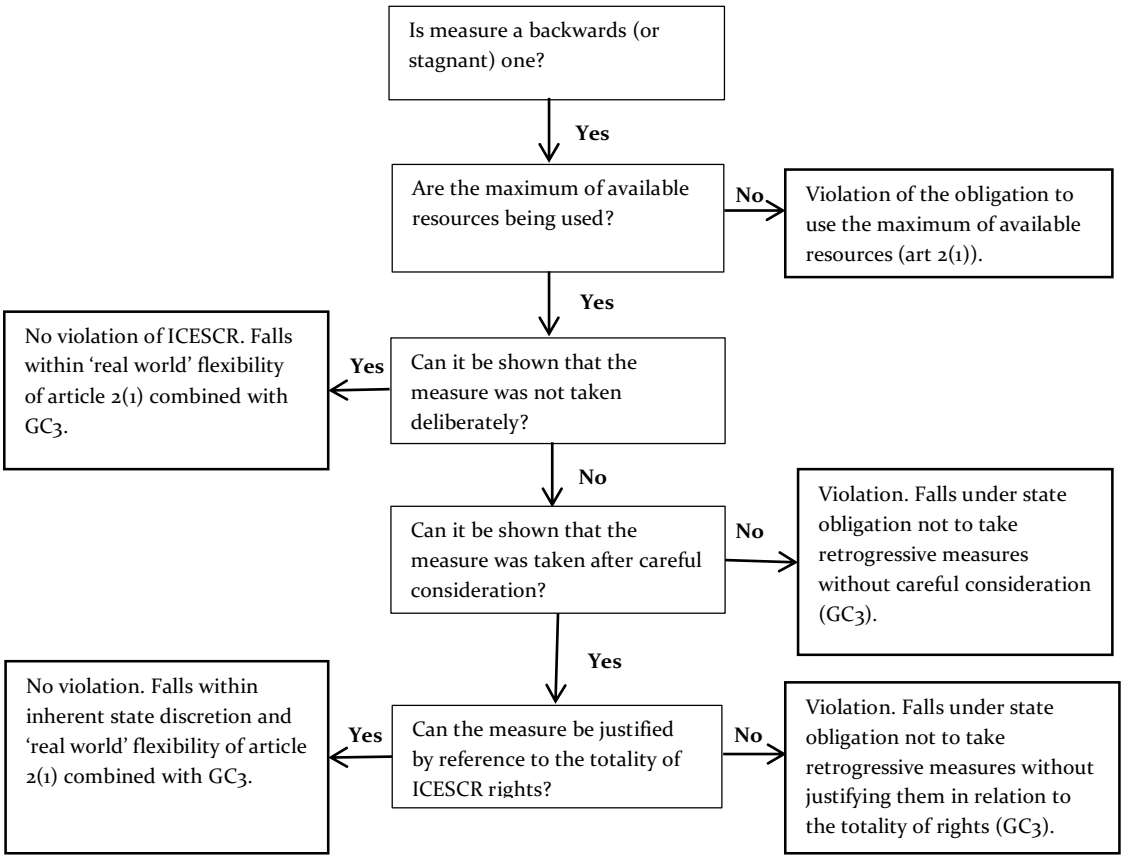

Figure 8

By the time the CESCR has developed General Comment 19 this balance has been significantly redressed, with the Comment explicitly putting more of a burden upon the State to prove the existence of some mitigating factors. In this version of the doctrine, the only aspects of proof not specifically assigned to the State are the deliberateness of the measure, and – understandably – the demonstration that a retrogressive measure has been taken. Yet, by this token, the complexity of this doctrine is amplified. This not only relates to various burdens of proof upon parties, but also to a complex sixth step of the analysis. In addition to the five criteria of General Comment 3, there are added a melee of six suggested factors that the CESCR will consider before making a finding of retrogression. This goes some way to positioning the previously discussed criteria (and the entire retrogression content of General Comment 3) as mere prerequisites to empower the CESCR to undertake a more substantive assessment based on a weighing of factors.

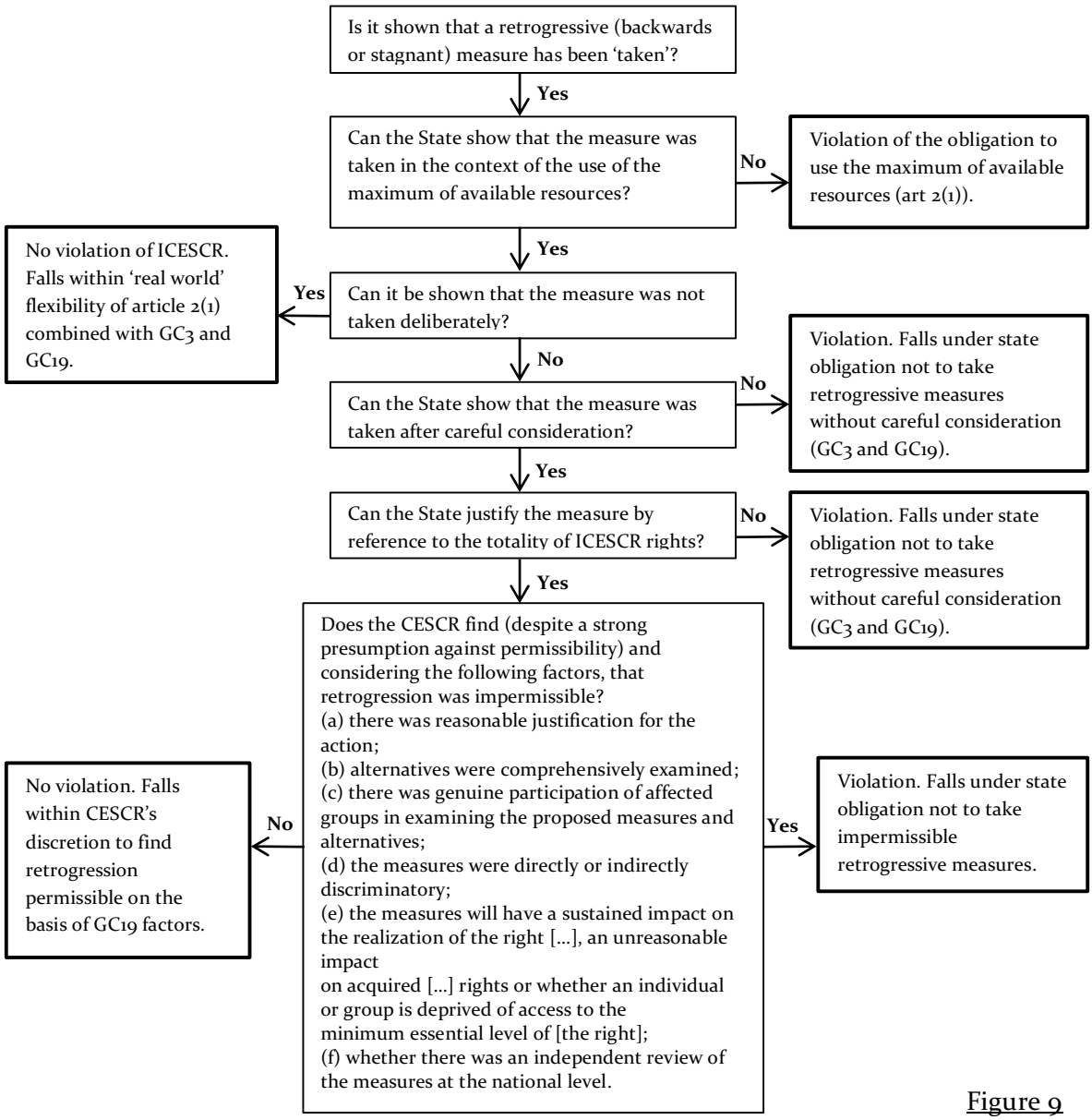

Figure 9

Beyond these more general difficulties with the process of proving retrogression, there are some specific problems with the various burdens of proof attached to the doctrine.[26] Primary amongst these is the difficulty in understanding what the Committee means to imply by its reiteration of the 'strong presumption of impermissibility' of retrogression. If simply meant as dissuasion of rights-harming State actions, the Committee would be advised to avoid the use of the im/permissibility terms which have a legal meaning in the retrogression context. It seems more likely, however, that this overlap in terms is intended to add something more legally significant.[27] The 'strong presumption' could, for instance, indicate that the standard or strength of the burden that rests upon States is a difficult one to overcome. The informational hegemony of States, and the often large teams of analysts available to them, justify a high bar for States to pass over before escaping a finding of

[26] For references related to this section of the discussion see Table 3.

[27] Courtis argues that retrogression is subject to 'heightened scrutiny'; Courtis (n 10) 393.

retrogression. Thus the combination of the most commonly used burdens might be (slightly) more clearly expressed by saying, 'there is a rebuttable but strong presumption that retrogressive measures are impermissible. It is for the State to rebut that presumption and thereby to prove their permissibility'.

Document	**Burden(s) of proof suggested**
General Comment 3[28]	[No express burden upon State]
General Comment 13[29]	'strong presumption of impermissibility' 'State party has the burden of proving'
General Comment 14[30]	'strong presumption that retrogressive measures … are not permissible' 'State party has the burden of proving'
General Comment 15[31]	'strong presumption that retrogressive measures … are prohibited' 'State party has the burden of proving'
General Comment 17[32]	'strong presumption that retrogressive measures … are not permissible' 'State party has the burden of proving'
General Comment 18[33]	'retrogressive measures should in principle not be taken' 'States parties have the burden of proving' 'strong presumption that retrogressive measures … are not permissible'
Statement on the use of MAR[34]	'the burden of proof rests with the State party'
General Comment 19[35]	'strong presumption that retrogressive measures … are prohibited ' 'State party has the burden of proving'
General Comment 21[36]	[No express burden upon State]
Letter to States[37]	[No express burden upon State]
General Comment 22[38]	'State party has the burden of proving'
General Comment 23[39]	'has to demonstrate'
Statement on Public Debt[40]	[No express burden upon State]

Table 3

[28] CESCR, *General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)* (UN Doc E/1991/23) para 9.

[29] CESCR, *General Comment 13: The Right to Education (Art 13 of the Covenant)* (UN Doc E/C12/1999/10 1999) para 45.

[30] CESCR, *General Comment 11: Plans of Action for Primary Education (Art 14 of the Covenant)* (UN Doc E/C12/1999/4 1999) para 32.

[31] CESCR, *General Comment 15: The Right to Water (Arts 11 and 12 of the Covenant)* (UN Doc E/C12/2002/11 2002) para 9.

[32] CESCR, *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Art 15(1)(c) of the Covenant)* (UN Doc E/C12/GC/17 2006) para 27.

[33] CESCR, *General Comment 18* (n 23) para 21.

[34] CESCR, 'MAR under OP' (n 24) paras 9, 10.

[35] CESCR, *General Comment 19* (n 19) para 42.

[36] CESCR, *General Comment 21: Right of Everyone to Take Part in Cultural Life (Art 15(1)(a) of the Covenant)* (UN Doc E/C12/GC/21 2001) para 65.

[37] Chairperson of the CESCR (n 24).

[38] CESCR, *General Comment 22* (n 23) para 38.

[39] CESCR, *General Comment 23: The Right to Just and Favourable Conditions of Work (Art 7 of the Covenant)* (UN Doc E/C12/GC/23 2016) para 52.

[40] CESCR, 'Statement on Public Debt, Austerity Measures and the ICESCR' (UN Doc E/C12/2016/1 2016) para 4.

This touches on complex questions of evidence and proof that are generally under-explored in relation to the treaty bodies, and which go beyond the scope of this research.[41] However, a few key points on these burdens are necessary. Firstly, while it might look attractive to divide the proof of the facts from legal evaluation (and the so-called burden of persuasion), this approach is challenging in the arena of human rights law.[42] Adjudication of human rights questions tends to lead to overlapping considerations of the social situation, the law and even normative questions. In a range of judicial settings courts have been vague about whether burdens of proof are to be applied to law, facts, or both.[43] The same is true of the CESCR which gives no guidance on whether the burden upon States is a burden that requires the production of evidence, a burden of persuasion, or a hybrid burden that requires a combination of the two. Yet the determination of these questions is vitally important in determining the 'risk of non-persuasion'[44] (i.e. who risks losing the dispute if the case is not proved). This should lie with the State according to the CESCR's guidance, but in practice the risk has been left squarely with civil society. Were the Optional Protocol's inquiry procedure to be used in relation to potential retrogression, the picture would become even more complex and could conceivably draw the CESCR itself into the exercise of proof/ disproof.[45]

There are a number of areas where non-retrogression steps into the territory of other obligations and encounters different burdens. For example, the CESCR has been clear that where the retrogression leads to an infringement of the core content of the ICESCR rights, then there is a straightforward relationship. It notes straightforwardly that, '[t]he adoption of any retrogressive measures incompatible with the core obligations … constitutes a violation'.[46] This amounts to a 'strict liability' approach in the sense that there are none of the flexibilities that exist in relation to retrogression. A similar approach is taken to equality between women and men (although this approach is more easily grounded in article 3 of the Covenant).[47]

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[41] For a classic and comprehensive look at such questions in the English common law, see HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, OUP 1985).

[42] Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches With Special Reference to the American and German Legal Systems* (Martinus Nijhoff Publishers 1998) 4.

[43] ibid 40.

[44] ibid 2.

[45] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, entered into force 5 May 2013, UN Res A/RES/63/117) art 11.

[46] CESCR, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (UN Doc E/C12/2000/4 2000) para 48; See also, CESCR, *General Comment 15* (n 29) para 42; CESCR, *General Comment 17* (n 30) para 42; CESCR, *General Comment 19* (n 19) para 64; CESCR, *General Comment 23* (n 37) para 52.

[47] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3) art 3; CESCR, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant)* (UN Doc E/C12/2005/4 2005) para 42.

Added to this is an additional layer of complexity in Optional Protocol complaints. There, as a key reassurance to States,[48] the issues are seen through a reasonableness lens and States are afforded an additional discretion in choosing which policy approach to pursue.[49] Thus in the Optional Protocol context, the CESCR will be required to filter its analysis through multiple and often unclear burdens of proof and standards of adjudication. This is likely to cloud reasoning and leave the process and proof elements unclear.

8.4. Timing and Triggers

As discussed in chapter 7, the time period between State examinations can be both lengthy and erratic.[50] This has an impact upon rights-holders seeking to vindicate their immediately realisable rights under the Covenant. In particular, it poses an obvious difficulty for any attempts to examine potential retrogression contemporaneously to its occurrence. Efforts to undertake *ex ante* assessments are similarly stymied. In the case of immediate obligations and, particularly in the context of this discussion, in the case of non-retrogression the periodic approach to examinations leaves an enforcement lag.[51]

The reason for this lag is straightforward. With an immediate obligation, at the moment that a violation has occurred it will be relatively obvious. Take the example of the right to education. It contains an immediate obligation upon the State to ensure non-discrimination in respect of education.[52] If the State enacts a discriminatory policy, then it would be in breach of its immediate obligation, and the discriminatory policy could be identified as a breach of the obligation with relative ease. While it may be more complicated in certain instances (for example, where a claim of indirect discrimination requires evidence of the differential impact), there is no doctrinal reason for a delay in finding a breach of the State's obligations. However, there may be some years between the enactment of a policy (and the consequent violation), and the examination of the State. A delay between the violation of an obligation and a State examination means a gap between violation and enforcement that has obvious implications for the rights-holder and the effectiveness of the ICESCR system. Non-retrogression suffers from exactly this problem. As an example, consider the lag between the beginning of potentially retrogressive austerity measures in Ireland in 2008

[48] Porter (n 24) 45.

[49] '[T]he Committee shall bear in mind that the State Party may adopt a range of possible policy measures'; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (n 45) art 8(4).

[50] Chapter 7, pp196-199.

[51] See also Chapter 7, p195.

[52] CESCR, *General Comment 11* (n 28) para 10.

(potentially constituting an immediate violation of the Covenant) and the State examination in 2015.[53]

The Optional Protocol provides a partial remedy to this problem, allowing two further triggers for the consideration of violations of the ICESCR in between periodic State examinations. However, the low ratification level (so far) and the slow pace at which complaints have been dealt with,[54] means that the Protocol is far from perfect as a remedy to this particular problem.[55] At the same time, potential doctrinal changes to retrogression contained in the Letter to States threaten to exacerbate the issue.[56] By requiring measures to be 'temporary' in that Letter, the CESCR inadvertently intensified the difficulty with infrequent periodic examinations. A detailed examination of retrogressive measures that have ended prior to the State examination would be somewhat redundant, and ended measures are likely to be classed by the CESCR as 'temporary' ones. Yet, such retrogressive policies may be far from temporary if they have existed for the eight years that can sometimes exist between State examinations.

However, even if such difficulties were to be addressed through an increased frequency of State examinations or additional triggers for the consideration of potential violations, there are remaining issues of process. As the flowchart at figure 9 above illustrates, the identification of retrogression can require at least five consequential stages of proof. Assuming first, that the CESCR is satisfied that prima facie retrogression is proved by the State report or shadow reports. The Committee would then need to request that the State prove a) the measure was taken in the context of the use of the maximum of available resources, b) after careful consideration, and c) is justified by reference to the totality of rights. It could do this through the List of Issues sent prior to the State examination and could follow up in the oral examination.[57] As was shown in the previous section, even if all of these are sufficiently proved by the State, the Committee would then have to go on to consider deliberateness and subsequently assess factors in favour of permissibility. It is clear that this process requires persistence and an investment of limited time from the

[53] CESCR, *Concluding Observations: Ireland* (UN Doc E/C12/IRL/CO/3 2015).

[54] The two views adopted so far having taken an average of a year and nine months from the author's submission. Inadmissibility decisions have been much quicker, takin an average of five months.

[55] Office of the High Commissioner for Human Rights, 'Table Of Pending Cases Before The Committee On Economic, Social And Cultural Rights, Considered Under The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights' (2015) <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx> accessed 20 September 2016; 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> accessed 20 September 2016.

[56] See Chapter 6.

[57] Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence Or Convergence?* (Intersentia 2004) 131, 133.

Committee, and a State that is (extremely) forthcoming in proving the validity of its actions. In reality, it is unlikely that there are enough opportunities for back-and-forth dialogue that is needed to establish all of the dimensions of proof.

In practice, the CESCR does not request States to provide any information on retrogression in their original State reports.[58] Further it has only explicitly used the List of Issues to ask States for (greater) information on potentially retrogressive measures in three of the 207 available Lists (1.5%). The most remarkable of these is where the Committee asks Spain in the first line 'to what extent the austerity measures taken by [it] in the context of the economic and financial crisis have taken into account the requirements specified in the letter'.[59] In the other two cases (Greece (2015), Portugal (2013))[60], the information that was requested would be far from sufficient to allow the Committee to properly assess for retrogression. There was nothing explicit included to remind the State of its burden of proof in relation to retrogression. Very similar phrasing was used by the Committee in both instances. The fuller of the two asked the State to:

> [p]lease provide a general assessment of the impact of the recent economic and financial crisis on the enjoyment of economic, social and cultural rights, *including a summary assessment of possible retrogressive policies and measures, as well as the principles on which such policies and measures were based, including the application of the relevant criteria* identified in the letter of the Chair of the Committee on Economic, Social and Cultural Rights addressed to State parties on 16 May 2012.[61]

It is clear that the Committee will continue to struggle to apply the full complexity of the doctrine of non-retrogression without adequate information, and without using all possible avenues to seek such information. Indeed, even in the two instances highlighted above where the CESCR requested that States addressed retrogression, no such elaboration was forthcoming in the States' replies to the List of Issues.[62] The replies were instead used as a forum for a general discussion of the countries' situations with no direct linkage to retrogression or its language.

Without more robust monitoring mechanisms at the international level to allow more regular and more rigorous review of States' potentially retrogressive measures, doctrinal changes will be ineffective. It is clear that the Committee does not have adequate time

[58] CESCR, 'Guidelines On Treaty-Specific Documents To Be Submitted By States Parties Under Articles 16 And 17 Of The International Covenant On Economic, Social And Cultural Rights' (2009) UN Doc E/C.12/2008/2.

[59] CESCR, *List of Issues prior to Submission: Spain* (UN Doc E/C12/ESP/QPR/6 2016) para 1.

[60] CESCR, *List of Issues: Greece* (UN Doc E/C12/GRC/Q/2 2015); CESCR, *List of Issues: Portugal* (UN Doc E/C12/PRT/Q/4 2013).

[61] CESCR, *List of Issues: Portugal* (n 60) para 3 (emphasis added); similar wording in CESCR, *List of Issues: Greece* (n 60) para 2.

[62] CESCR, *Reply to the List of Issues: Greece* (UN Doc E/C12/GRC/Q/2/Add1 2015) paras 2-12; CESCR, *Reply to the List of Issues: Portugal* (UN Doc E/C12/PRT/Q/4/Add1 2014) paras 13-31.

to properly examine States. Whatever form the obligations take, and however strong and clear they are, they will require time to apply.

As such, in this area the (re)constructed retrogression is a limited response to the difficulties. It does relieve some of the pressures through a simplification of the doctrine. For example, it ensures that when a periodic examination comes around, retrogression is capable of being properly examined without the need for excessive longitudinal data. It also removes the multitude of proofs and counter-proofs that currently affect the doctrine. These currently mean more back-and-forth exchanges than the Committee has time for or than their processes can accommodate. This latter point in particular might mean that under the (re)construction the Committee was in a position to make greater mentions of retrogression, even if it lacked the time to examine the State sufficiently to find a violation.

8.5. The Object of Retrogression

The closer that the CESCR's doctrines of non-retrogression are examined, the more complex they become. We know that we are trying to identify backwardness (and maybe stagnation also).[63] But backwardness in *what*? Nolan, Lusiani and Courtis – building in some respects on Courtis' earlier work[64] – tackle this question by drawing a distinction between 'normative' and 'empirical' retrogression.[65] Normative retrogression 'concerns steps backwards in terms of legal, de jure guarantees',[66] while empirical retrogression 'is concerned with de facto, empirical backsliding in the effective enjoyment of the rights'.[67]

This is a useful categorisation that takes the analysis of this area further. In particular, Nolan *et al* identify through this model some of the difficulties that are faced by the CESCR in evidencing, showing causation of, and adjudicating on empirical retrogression.[68]

Their division can be extended in order to add another useful distinction; the difference between retrogressive *measures* and retrogressive *effects*. In the case of normative retrogression, the backwardness is assessed in isolation from its actual effects. It is

[63] See discussion above at Chapter 3, p88 and Chapter 4, p105.

[64] Christian Courtis, 'La Prohibicíon De Regresividad En Materia De Derechos Sociales: Apuntes Introductorios' in Christian Courtis (ed), *Ni Un Paso Atrás: La Prohibicíon De Regresividad En Materia De Derechos Sociales* (Editores de Puerto 2006).

[65] Nolan, Lusiani and Courtis (n 14) 123.

[66] Courtis defines this as 'any measure adopted by the state that suppresses, restricts or limits the content of the entitlements already guaranteed by legislation constitutes a *prima facie* violation. It entails a comparison between the previously existing and the newly passed legislation, regulations or practices, in order to assess their retrogressive character'; Courtis (n 10) 393.

[67] Nolan, Lusiani and Courtis (n 14) 123.

[68] ibid 124, 127.

essentially a paper exercise, that at its extreme could incorporate predictions of the effects that might flow. This allows – as Nolan et al identify – legally trained individuals to assess such retrogression easily.[69] The nature of such assessments as paper-based causes them to also to be abstract or hypothetical. This is beneficial in one sense as it facilitates early assessments of violations of the doctrine of non-retrogression; there is simply no need for negative effects to be occurring when the retrogression can be demonstrated in the law. How rapidly such assessments would be permitted would affect where the ex post/ ex ante division is placed, however with normative retrogression it would be possible to make a full and accurate assessment of even a draft law *before any* retrogression (normative or empirical) had been enacted. This is useful in guiding State conduct and in preventing (rather than reacting to) ESR violations.

Of course, while assessing the retrogression of a (normative) measure is straightforward, there are significant difficulties with assessing whether (empirical) effects are retrogressive. Nolan *et al* discuss these in some depth so they will not be repeated here,[70] but the focus of this strand of retrogression on de facto enjoyment of rights makes 'comprehensive'[71] real-world evidence essential. The authors further emphasise the need for a longitudinal assessment:

> [b]uilding this kind of empirical case is much less straightforward, requiring a careful monitoring of the degree of empirical retrogression over time…[72]

Naturally, in the period of time needed for evidence to appear and be collected, human rights violations will be allowed to persist.

A number of further points arise when these two strands of retrogression are considered together. There will be an overlap between the two (a sort-of central area of a Venn diagram), where *both* normative and empirical retrogression are evidenced. A new legislative measure might be retrogressive on paper but not be identified as such because of a lack of interest in the change at the time of its passage. When later retrogressive effects are seen and evidenced, then a claim of both types of retrogression might occur. While not necessarily problematic, such an overlap will have to be consistently and clearly managed to avoid confusion (does such 'double-retrogression' require closer scrutiny or harsher findings, for example?).

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[69] ibid 127. See also Courtis who notes such work is 'not foreign in a range of areas of law'; Courtis (n 10) 393.

[70] Nolan, Lusiani and Courtis (n 14) 124–128.

[71] ibid 124.

[72] ibid 128.

Again, considered in combination, it is clear that the significantly less burdensome path to proving normative retrogression creates a practical bias in favour of that strand. It would be advisable for rights-bearers to bring their claim within the scope of normative retrogression if at all possible, and even if they are actually experiencing real-world effects. It is this latter point that is concerning. There is a danger that retrogression becomes predominantly an exercise in legal argumentation, and the experiences of individuals become isolated because the effects upon them have been insufficiently long, severe or widespread to constitute 'proof'. Add to this the possibility that normative retrogression could be found without the law ever having been enforced or without practically impacting anyone, and the gap between the two strands becomes very large.

This large gap between the two was demonstrated when the CESCR noted that it was:

> concerned at the regressive measures adopted by [Spain] that increase university tuition fees, thus jeopardizing access to university education for disadvantaged and marginalized individuals and groups.[73]

Using a normative retrogression approach, finding retrogression would be relatively easy and substantially paper-based, involving a comparison of the laws before and after the change and assessing for a reduction in the level of rights protection granted. However, to show empirical retrogression the effects of the new regime would have to be gathered together over a period of time and the link to the change demonstrated.

This discussion above, in summary, expresses a scepticism about the special place afforded by 'normative retrogression' to backwards steps based in *law* (rather than in service delivery, budgetary allocations, or discourse). One solution to this is a broader approach to 'normative' retrogression, particularly in incorporating other measures that can readily be assessed on paper. This is why aligning the strands of retrogression in terms of normative-measures and empirical-effects is analytically valuable. It allows Nolan *et al*'s key distinction between paper-based and practice-based assessments to be maintained, while opening up a space for a larger range of paper-based assessments.

Thus possible normative retrogression (or, in other terms, a retrogressive *measure*) might be contemplated in respect of any measure that can be properly subjected to a paper-based assessment. This could include 'administrative, budgetary [or] judicial'[74] measures and State 'strategies, policies and programmes'.[75] Expanding the image of normative retrogression to

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[73] CESCR, *Concluding Observations: Spain* (n 6) para 28. Due to the variations in terminology, it is impossible to know whether the Committee intended to suggest that this 'regressive' measure was also potentially 'retrogressive'. See further, discussion at Chapter 3, p74.

[74] CESCR, *General Comment 18* (n 23) para 22.

[75] CESCR, *General Comment 19* (n 19) para 67.

incorporate some of these measures would mean more challenging assessments than might be the case for statutory law, but they would still possible in some instances. Care, for example, is required to avoid over-interpreting budget reductions as necessarily implying retrogression.[76] The context of the measure will be relevant to determining whether normative retrogression has occurred. However, such context is equally important in respect of legal measures. The repeal of a law may appear to be retrogressive until the context of judicial developments, operational effectiveness, and new statutory enactments are considered.

While it may be more challenging to assess for normative retrogression in respect of some non-legal measures, and even allowing for the fact that a conclusion will not be reachable in all cases, such assessments are possible in principle. For example, while all reductions in budgetary allocations will not amount to retrogression, it is plausible to assert that drastic cuts that are not justified by the context can be assessed on paper as constituting normative retrogression. To insist on a delay while the effects of these cuts are seen, evidenced, and dealt with under empirical retrogression would be perverse.

A further budget-related example drawn from O'Connell et al's work, further illustrates the need for a broader interpretation of normative retrogression. They note 'a promise of funding that is subsequently withdrawn before it was actually allocated may constitute a retrogressive measure…'.[77] It is agreed that such a State action could be properly addressed by retrogression, but the only realistic route for enforcement of the doctrine in such a scenario would be through normative retrogression (a paper-based reduction in standards). Attempts to bring such measures under empirical retrogression would be virtually impossible given the challenges of gathering evidence of reduced enjoyment flowing from a cancelled funding promise.

While it will be more difficult to prove normative retrogression in non-legal measures, and allowing for the fact it may not always be possible to reach a firm conclusion on retrogression, there are significant benefits to broadening the net. By addressing a greater range of non-legal measures under normative retrogression, better use of its more straightforward methodology will be made. This would leave empirical retrogression as a residual strand of retrogression that can address those reductions in enjoyment that were less obvious from an examination of the measure itself.

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[76] O'Connell and others (n 12) 48 (table 2.6).

[77] ibid 92.

The proliferation of divisions, categorisations and stages of retrogression, while intended to assist in the task of developing normative content and clarifying the doctrine, simultaneously adds a complexity to the doctrine's operation. Such complexity paralyses the operation of the doctrine. The (re)constructed doctrine assists in stripping away some of these complexities by taking a 'flatter' approach to retrogression. It asks a more straightforward question about State activity. The (re)construction can still address the same violations (and some further ones) as current versions without the need for the same degree of complex subdivision. Of course, in encouraging greater practicability, such a simplification also supports the doctrine's use in response to structural threats and aids the idea of retrogression in becoming more accessible to micro groups.

8.6. Conclusions

There are a wide range of more practical or applied concerns with the doctrine of non-retrogression that present obstacles to its use. These, it has been argued, are fundamental not only to the way that the CESCR operates, but also to broader questions of how the doctrine can function within the ICESCR. In particular, this chapter focussed on the web of assessment challenges that are associated with the doctrine.

Terminology and the means of triggering an examination of potential retrogression were addressed and more consistent use of language and further triggers were argued for. The chapter considered the implications of Nolan *et al*'s categorisation of normative and empirical retrogression. The significant advantages of such an approach were acknowledged, while noting the accompanying complexity. Finally, the CESCR's approach to proof in the context of non-retrogression was addressed. The multitude of steps that must be passed through in order to demonstrate a violation were set out, alongside an analysis of the complex burdens of proof that are attached to the doctrine.

As has been seen, the (re)constructed doctrine holds potential in addressing these practical challenges. Its main function in response to many of the practical challenges is to simplify processes and rationalise unneeded elements. In relation to terminology this can reduce conflicts and complications, while in proving retrogression the more straightforward approach makes proof more realistic. Although, the doctrinal changes of the (re)construction can provide only a limited response to the long delays in State examinations, it can allow more efficient examinations when they occur.

While the (re)constructed version of retrogression offers the normative development required, there is a good deal of practical development required also. If successful and regular findings of retrogression are to be made in appropriate circumstances, at least some of the practical and institutional pressures must be relieved. This demands a broader consideration of the ICESCR and the CESCR's operation, an assessment of the opportunities for cooperation with other UN actors, and a revisiting of the resource constraints upon the treaty bodies.

Chapter 9

Conclusions and Cross Applicability

The title of this thesis promised to (re)construct a purpose for retrogression and (re)construct retrogression for a purpose. In promising this, it was implied that retrogression lacks a purpose and that, in any case, it is not in a form which would allow it to pursue a purpose. Absent both of these central characteristics (purpose and form), the retrogression is left without much content. The claim of the title is less stark than this as it is qualified by the idea of partial reconstruction, or the assemblage of current forms of the doctrine, some established tenets, and ideas drawn from the literature and analogous areas of practice.

The doctrine of non-retrogression – like the ICESCR in many respects – is more relevant than ever, yet still struggles to demonstrate that relevance when it is most needed. The doctrine's performance was lack lustre during the most recent crises. The chapters above, therefore, sought to identify the core content of retrogression and to show how the challenges that retrogression faces could best be addressed.

In the first part of the thesis, therefore, the focus was on identifying what the current purpose of retrogression is, and what a reconstructed purpose might be. The starting point in this analysis was the historical background of the ICESCR and non-retrogression. This led to the identification of a number of factors that suggest a more disrupted and uncertain beginning for the doctrine than is often portrayed. Following from this, the enunciations of the CESCR's doctrine of non-retrogression were deconstructed and grouped. This allowed the doctrine to be seen as a fragmented entity with multiple versions. These were grouped according to their legal basis and relationship with the ICESCR more broadly. Commonalties between these four conceptual models were few in number, and it was ultimately concluded that the retrogression lacked a core purpose.

Having shown up the doctrine's disarray, this part of the thesis was concluded by the (re)construction of the doctrine's purpose. It was argued that a clear purpose for retrogression could act as a heuristic device, adding stability and a point of reference against which developments could be judged. The furtherance of the progressive realisation obligation was selected as an appropriate overarching purpose for the doctrine. This choice was based on the need for a strong legal basis in the Covenant, the symbolism of progressive realisation as an important general obligation, and the significant potential for operational improvements with the obligation.

Having (re)purposed the doctrine, the ground had been laid for the second of the reconstructions of the title; the (re)construction of the doctrine itself. The doctrine was rationalised and clarified and it was suggested that a new form of words might be that:

> a retrogressive measure is defined as an action, inaction or contribution to a trend which is likely to negatively affect the progressive realisation of individuals' ICESCR rights.

This process of (re)construction was substantially undertaken in chapter 4, however, the remaining chapters of the thesis added rigour to the (re)construction by 'stress testing' the newly (re)constructed doctrine against a number of key challenges.

The tests set for the doctrine were chosen as issues that have in the past presented challenges to the doctrine and are likely to represent substantial barriers in the future. The four key tests which were set up for retrogression were its ability to engage with structural threats, its capacity for resilience in crises, its responsiveness to micro concerns, and its practicability.

In relation to structural threats, it was shown that there was a pattern of the Committee only engaging to a limited extent with the largest issues facing the Covenant. While being competent at applying the ICESCR to well-defined situations, and at offering deference to other bodies, the Committee has generally avoided the full engagement with the real root causes of ESR violations, nor has it comprehensively addressed systemic threats. These failures are partly linked to progressive realisation, which fails to speak to high-level policy making in a coherent way. It was consequently argued that the redesigned doctrine of non-retrogression could provide a more flexible and open basis upon which to engage with structural threats.

The doctrine's ability to operate in situations of crisis was addressed next. Here, the research focused on the most recent financial and economic crises to show the pressures and distortions that were brought to bear upon non-retrogression. It was argued that the CESCR's Letter to States had, in a highly pressurised situation, changed the terms and meaning of the doctrine and taken it in a new and damaging direction. The (re)constructed doctrine, it was suggested, could provide greater resilience in such crisis situations. While remaining true to the content and dynamics of the ICESCR, it allows the CESCR a degree of flexibility should it require it, thus ameliorating the need for a rushed reshaping of the doctrine during crises. And, if such reshaping was to be needed in the context of an exceptional crisis, the clear purpose attached to the doctrine could provide direction and consistency in that context.

The issue of responsiveness to micro groups was also discussed. Although, there is undoubtedly a degree of CESCR engagement with civil society there is arguably capacity for greater responsiveness to a different kind of actor. There are often barriers to the voices of the smallest, least established, and least resourced groups being heard. A multitude of barriers such as the focus of progressive realisation, fears surrounding the Optional Protocol, the predominance of *ex post* review, resource shortages and the scheduling of State examinations were identified. Although a number of these require institutional changes, the role that a reconstructed doctrine could play in affirming the place of individuals and micro actors within the Covenant was also discussed. Particularly by supplementing some of the weaknesses of the progressive realisation obligation as regards micro actors, the (re)construction can facilitate better responsiveness to micro actors.

The final test for the (re)construction – its ability to address a range of practical issues – was considered in chapter 8. The deepening complexity and variation in the CESCR's versions of retrogression has brought with it significant issues that have dogged the application of the doctrine. Addressed, in particular, were issues of terminology, proof, the timing of examinations, and a vagueness about the object of the doctrine's concerns. The simplification of the (re)constructed version of retrogression satisfactorily addresses these problems. It provides less convoluted terminology, clear lines and burdens of proof, and simplified processes.

Having considered this range of issues, a number of more general conclusions can now be drawn. These conclusions are, of course, drawn from what has already been argued. However, they also highlight a number of areas of more general concern and areas for future development. These concluding aspects are addressed in terms of; iterative understandings, consistency, innovation, connectivity, and consolidation.

9.1. Iterative Understandings

In several places the need for new conceptions of the doctrine of non-retrogression, the ICESCR, or both was highlighted. In some instances of civil society and academic practice, the picture of the doctrine remains reliant upon a superseded view of the CESCR's outputs (for example where General Comment 3 is seen as the core, or only, statement of retrogression). Elsewhere the research showed in chapter 2 how the view of the ICESCR as a whole being subjugated by the Cold War needs revisiting in order to properly consider the post-conflict situation. In other places it was argued that the CESCR's role in informing policy making, the understanding of the central progressive realisation obligation, and the

place of retrogression within the Covenant would all benefit from an updated consideration (in chapters 4, 2, and 4 respectively).

This call for updated – iterative – understandings of the ICESCR and non-retrogression is not a radical one, or an accusatory one. Many of the conceptions which might now be thought of as (slightly) out of date or superseded were, at one point in time, central to the development of the ICESCR norms and the implementation of the rights (especially the dominant view of the Cold War divide seen in chapter). They created opportunities for the progression of ESR. However, without an iterative consideration of their validity and effectiveness, such understandings start to look at odds with the other content and the context of the ICESCR. It is implicit that, unaddressed, such disjunctures between the understanding of the Covenant and the broader reality, will eventually halt evolution of the ESR project and begin to damage it.

The thesis offered some such 'iterative' understandings, although there are clearly many more still to be undertaken in further research. One of the most important contributions of the research was to return to the early days of the CESCR to identify the context of its first elaboration of the doctrine of non-retrogression. A return to this context suggested an almost accidental creation of the doctrine. Likewise, iteration was achieved by returning to the understanding of the doctrine as a single undivided entity with more comparators and more materials (for example, the Committee's treatment of the financial and economic crises). This return allowed the research to mount the argument that 'the' doctrine was composed of conflicted and disparate versions.

9.2. Consistency

The idea that consistency of output is crucial, is a relatively obvious endpoint of the arguments that were advanced throughout the thesis and especially in the earlier chapters. Much of the confusion, lack of purpose, and weak effectiveness of non-retrogression can be attributed to the disarray which has often been a hallmark of the doctrine. The production of nine different versions of a single doctrine by a single committee in the course of fourteen documents is remarkable. Even accounting for the changing membership of the CESCR and the similarity of some of these versions (although there were still four substantially different models of retrogression identified), there is a clear amount of fluctuation.

The consequences of such fluctuations were given significant attention throughout the thesis, but in particular there is a range of practical impacts that arise from such high levels of inconsistency. The changes in how the doctrine is labelled, for example, were noted. Additionally, the myriad different mechanisms for proving and adjudicating upon retrogression were also unpacked to show the difficulties that can result for States, NGOs and the CESCR.

To argue for consistency, however, is not to argue for an unchanging approach to the ICESCR and its norms. In fact, as the following section concludes, the need for change is also crucial. However, where such change occurs it must be clearly marked as such. Clearer redefinitions would avoid the melange of retrogression standards detailed in chapter 3. Further, change should be introduced at an appropriate place in time to avoid the scenario of emergency-related changeability outlined in chapter 6.

9.3. Innovation

A persistent line of argumentation throughout the thesis was that the CESCR should innovate in response to the threats, changes and challenges that it and ESR face.

The Committee and the communities that support its activities must be attuned to the developing contexts around them. Some of the contexts that were identified in the thesis included economic, environmental, and more broadly 'structural' threats. It was argued that more could be done to engage with these phenomena in order to benefit ESR progression. Elsewhere, the importance of an evolving dialogue with micro groups was posited as central to the success of the CESCR's efforts.

When and how to respond to changes in context, is a self-evidently difficult and important question. However, the first step must be to acknowledge these changes. The CESCR's failure to do so – even despite the analytical assistance of the scholarship – was highlighted in several instances. Beyond mere acknowledgement of contexts, the thesis argued for responsiveness, engagement, resilience and practicability in different circumstances. Each of these types of response was tailored to the threat or opportunity, yet, taken together they can all be seen as innovations to the CESCR's practice.

Such innovations, while arguably important for any institution or legal body, are all the more crucial for the CESCR given the fixed legal document that it works with. While the approaches and doctrines of many other legal bodies are refreshed by a change in the

(statutory or treaty) law the CESCR has worked from the same short document since its creation. This means that effective responses to changing contexts require the Committee to be innovative in its practices and to make full use of its available flexibilities. In addition, where new legal bases arise, such as with the Optional Protocol, the Committee should critically examine how it can use them to re-shape, refresh and re-start ESR monitoring processes.

The thesis argues for multiple innovations on the CESCR's practice. Most centrally, the repurposing and reconstruction of the doctrine of non-retrogression is argued for. It is possible, and indeed the intention, that a rethinking of this general obligation of the ICESCR would pull other obligations in innovative directions. Most obviously, there is potential for a more effective – and more used – progressive realisation obligation to result. However beyond this, the thesis also argued, for example, for a more innovative approach to micro groups and reforms to the CESCR's currently rigid timetable of State examinations.

9.4. Connectivity

Another theme to arise from the research relates to the deep interconnections of the obligations. While the thesis addresses many questions that are unique to non-retrogression, in many other respects the questions addressed and the arguments made could be applied to other areas. This is particularly true of the later chapters which address structural, crisis, micro and practical issues. These issues are all significant for retrogression, but they also pervade the ICESCR more generally. Similar attention to the concepts of progressive realisation, maximum available resources, the minimum core, and the typologies would be beneficial.

However, beyond a simple claim for further research and Committee developments along these lines, it is arguable that more connected analyses of the obligations are also required. This thesis, for example, unpacked the relationship between retrogression and progressive realisation and the tripartite typology. However these relationships might appear differently if viewed from a perspective where progressive realisation was the dominant frame of reference.

Neither does the idea of connectivity apply only to connections between the ICESCR obligations. It is a well-developed position that ICESCR and ICCPR obligations are interdependent and indivisible. Yet, there are further – perhaps more obvious – connections between the CESCR approach to non-retrogression and the CommRC's.

The institutional is additionally connected to the doctrinal. It was argued at several points that the position of the CESCR or its institutional processes in State examinations, issuing letters, using Statements or drafting General Comments, has had a concrete impact upon the doctrinal outcome.

More broadly, greater recognition of the connection of the ICESCR norms to externalities is still needed. Work on budget analysis is an important first step in this regard, beginning the recognition of the dependence of ESR upon fiscal policy. However, this can only be considered a first step. ESR are embedded within social, political, cultural and environmental situations. If the legal obligations are to be used as basis for serious engagement with policy actors, they must reflect – but not necessarily be subordinated to – these external conditions.

9.5. Consolidation

The thesis argued that retrogression is a complex, fragmented doctrine in need of sustained critical attention and, ultimately, (re)purposing and (re)construction. An effective response to structural threats, crises, micro groups, and practical complexities can, it has been posited, be at least partly achieved by such a reconstruction. However, far from concluding that such a changed approach to retrogression would satisfy the array of demands upon the ICESCR system, the thesis identifies a range of further themes to be pursued.

The themes and reforms that have been discussed are far from comprehensive, but the thing which connects them is their need for a robust exercise of consolidation. Like the (re)construction exercise undertaken with respect to retrogression, there is room for progressive realisation, the minimum core, limitations, processes of proof and many more key ideas within the ICESCR to be re-addressed in a critical manner. These obligations should be consolidated, with the successful and central parts retained and while extraneous or distracting elements are removed. The array of obligations which still require refinement, demonstrates the degree to which the ICESCR system is still a work in progress.

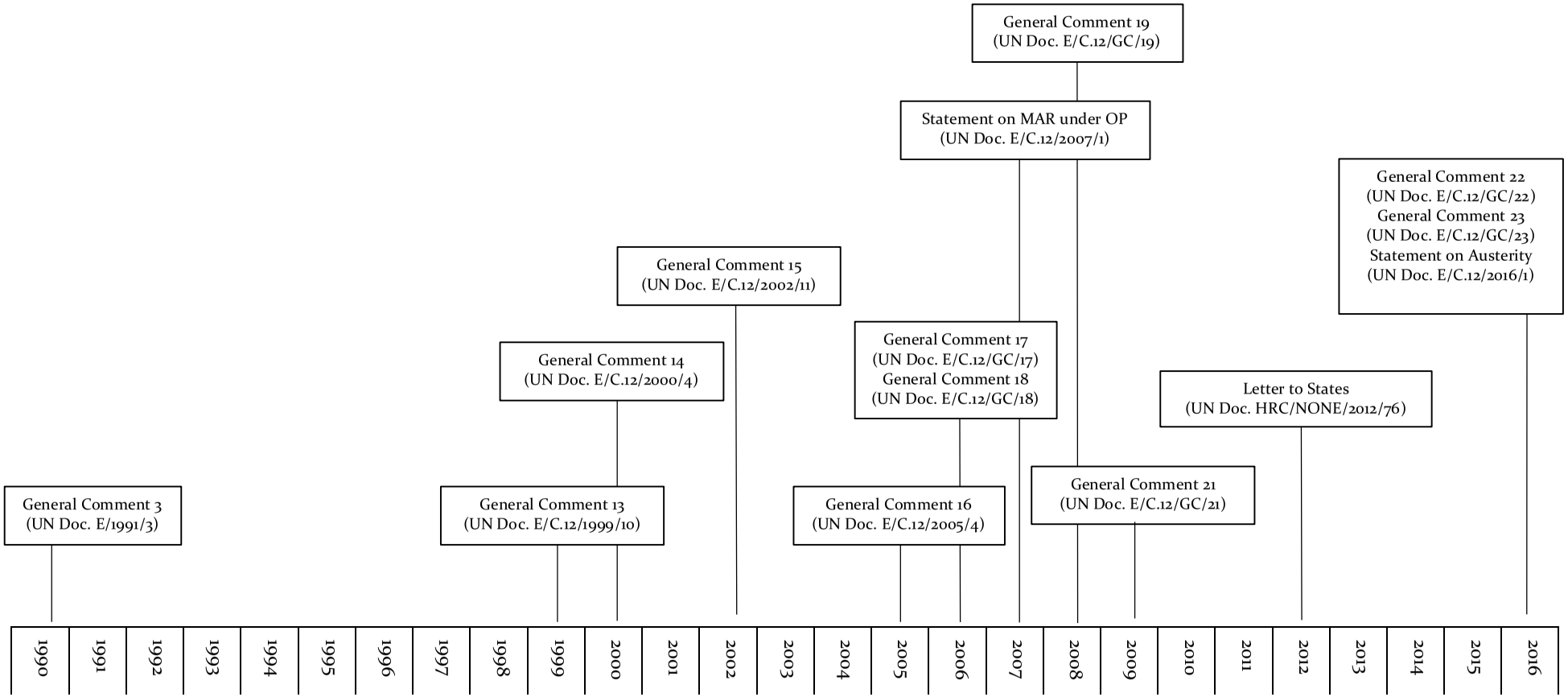
The ideas of iteration, consistency, innovation, connectivity, and consolidation are offered as routes to a richer and more coherent approach to the ICESCR obligations. By exploring retrogression in conjunction with these themes, the doctrine has been cast as more complex, more troubling and less intelligible. It has been shown to be fragmented and disconnected from many of the challenges faced by the doctrine and the Covenant. Yet, the thesis has also sought to rebuild retrogression, tying it, probably for the first time, to a

consistent purpose. A (re)constructed doctrine that works to further the progressive realisation obligation can, in securing the relevance of non-retrogression, have a positive impact on that main article 2(1) obligation, and the ICESCR more broadly.

We can conclude where we began in the introduction. The doctrine of non-retrogression has great, unrealised potential to advance ESR standards. It could barely be more relevant to many of the threats posed to ICESCR rights. Such potential is clearly all the more valuable in the context of crises. Yet, the doctrine has largely been consigned to the side-lines. The very wide gap between retrogression's potential and actual role highlights how significant the required changes are. Adjusting retrogression into a tenth, eleventh, or twelfth version will not bring a sudden clarity of purpose to the doctrine, nor will it bring a landslide of effectiveness. However, the features of the (re)construction here might bring such changes. If continued effort from the CESCR and advocacy and scholarly communities is to be invested, it should be invested in the required fundamental changes and not into continued mending.

Appendix A

Timeline of the CESCR's major uses of the doctrine of non-retrogression



Appendix B

Versions of retrogression criteria

Document	General Comment 3	General Comment 13	General Comment 14	General Comment 15
Year	1991	1999	2000	2002
Criteria applied	Deliberate	Deliberate	Deliberate	Deliberate
	Justified by reference to totality of rights	Justified by reference to totality of rights	Justified by reference to totality of rights	Justified by reference to totality of rights
	Use of Maximum Available Resources	Use of Maximum Available Resources	Use of Maximum Available Resources	Use of Maximum Available Resources
		Strong Presumption	Strong Presumption	Strong Presumption
		Burden upon State	Burden upon State	Burden upon State
		Consideration of alternatives	Consideration of alternatives	Consideration of alternatives

Document	General Comment 16	General Comment 17	General Comment 18	Statement on MAR under OP
Year	2005	2005	2005	2007
Criteria applied		Deliberate	Deliberate	
		Justified by reference to totality of rights	Justified by reference to totality of rights	Justified by reference to totality of rights
			Use of Maximum Available Resources	Use of Maximum Available Resources
		Strong Presumption		
		Burden upon State	Burden upon State	Burden upon State
		Consideration of alternatives	Consideration of alternatives	Consideration (of alternatives)
			In principle retrogression impermissible	
				Where 'resources' invoked consider; level of development, core, recession, disaster, alternatives, intl cooperation.
	Retrogressive Measures that enact discrimination are a violation of article 3			

Document	General Comment 19	General Comment 21	Letter to States
Year	2007	2009	2012
Criteria applied	Deliberate	Deliberate	Temporary
	Justified by reference to totality of rights	Justified by reference to totality of rights	Necessary and proportionate
	Use of Maximum Available Resources	Use of Maximum Available Resources	Discrimination
	Strong Presumption	Strong Presumption ('not permitted')	Core protected
	Burden upon State		
	(Comprehensive) Consideration of alternatives	Consideration of alternatives	
	Reasonable justification		
	Participation		
	Discrimination		
	Sustained impact		
	Unreasonable impact		
	Minimum essential level		
	Independent review		

Document	General Comment 22	General Comment 23	Statement on Public Debt, Austerity Measures & the ICESCR
Year	2016	2016	2016
Criteria applied	Temporary	Temporary	Temporary
	Necessary	Necessary	Necessary and proportionate
	Discrimination	Discrimination	Discrimination
		Core protected	Core Protected
		Deliberate	
		Justification	Justification
		Use of Maximum Available Resources	
	Burden upon State	Burden upon State	
	Strong Presumption (extreme, inevitable)		
	Don't disproportionately affect disadvantaged or marginalised		Don't disproportionately affect disadvantaged or marginalised
		Careful Consideration	

Appendix C

Ratification data

Accumulation of Ratifications for the ICCPR and the ICESCR

	ICCPR		ICESCR	
Year Ending	Total Ratifications	Ratifications per year	Total Ratifications	Ratifications per year
1966	0	0	0	0
1967	0	0	0	0
1968	0	0	0	0
1969	1	1	1	1
1970	6	5	6	5
1971	9	3	9	3
1972	12	3	12	3
1973	17	5	17	5
1974	23	6	23	6
1975	27	4	28	5
1976	32	5	34	6
1977	37	5	39	5
1978	41	4	43	4
1979	52	11	55	12
1980	58	6	60	5
1981	62	4	63	3
1982	66	4	68	5
1983	69	3	72	4
1984	74	5	77	5
1985	77	3	80	3
1986	78	1	82	2
1987	82	4	85	3
1988	84	2	88	3
1989	84	0	89	1
1990	86	2	91	2
1991	90	4	95	4
1992	98	8	102	7
1993	113	15	116	14
1994	124	11	126	10
1995	128	4	130	4
1996	131	3	132	2
1997	135	4	134	2
1998	139	4	136	2
1999	141	2	138	2
2000	143	2	141	3
2001	146	3	142	1
2002	147	1	145	3
2003	149	2	146	1
2004	151	2	148	2
2005	154	3	151	3
2006	154	0	151	0
2007	160	6	155	4
2008	160	0	157	2
2009	164	4	160	3
2010	165	1	160	0
2011	167	2	160	0
2012	167	0	160	0
2013	167	0	161	1
2014	168	1	162	1
2015	168	0	164	2

Time Gap between the Ratification of the ICCPR and the ICESCR

State	Date ICCPR Ratified	Date ICESCR Ratified	Delay to ICESCR (days)	Delay to ICESCR (years)
Afghanistan	24/01/1983	24/01/1983	0	0.00
Albania	04/10/1991	04/10/1991	0	0.00
Algeria	12/09/1989	12/09/1989	0	0.00
Andorra	22/09/2006	*ICESCR not Ratified*	-	-
Angola	10/01/1992	10/01/1992	0	0.00
Argentina	08/08/1986	08/08/1986	0	0.00
Armenia	23/06/1993	13/09/1993	82	0.22
Australia	13/08/1980	10/12/1975	-1708	-4.68
Austria	10/09/1978	10/09/1978	0	0.00
Azerbaijan	13/08/1992	13/08/1992	0	0.00
Bahamas	23/12/2008	23/12/2008	0	0.00
Bahrain	20/09/2006	27/09/2007	372	1.02
Bangladesh	06/09/2000	05/10/1998	-702	-1.92
Barbados	05/01/1973	05/01/1973	0	0.00
Belarus	12/11/1973	12/11/1973	0	0.00
Belgium	21/04/1983	21/04/1983	0	0.00
Belize	10/06/1996	09/03/2015	6846	18.76
Benin	12/03/1992	12/03/1992	0	0.00
Bolivia	12/08/1982	12/08/1982	0	0.00
Bosnia and Herzegovina	01/09/1993	01/09/1993	0	0.00
Botswana	08/09/2000	*ICESCR not Ratified*	-	-
Brazil	24/01/1992	24/01/1992	0	0.00
Bulgaria	21/09/1970	21/09/1970	0	0.00
Burkina Faso	04/01/1999	04/01/1999	0	0.00
Burundi	09/05/1990	09/05/1990	0	0.00
Cabo Verde	06/08/1993	06/08/1993	0	0.00
Cambodia	26/05/1992	26/05/1992	0	0.00
Cameroon	27/06/1984	27/06/1984	0	0.00
Canada	19/05/1976	19/05/1976	0	0.00
Central African Republic	08/05/1981	08/05/1981	0	0.00
Chad	09/06/1995	09/06/1995	0	0.00
Chile	10/02/1972	10/02/1972	0	0.00
China	*ICCPR not Ratified*	27/03/2001	-	-
Colombia	29/10/1969	29/10/1969	0	0.00
Congo	05/10/1983	05/10/1983	0	0.00
Costa Rica	29/11/1968	29/11/1968	0	0.00
Côte d'Ivoire	26/03/1992	26/03/1992	0	0.00
Croatia	12/10/1992	12/10/1992	0	0.00
Cyprus	02/04/1969	02/04/1969	0	0.00
Czech Republic	22/02/1993	22/02/1993	0	0.00
Democratic People's Republic of Korea	14/09/1981	14/09/1981	0	0.00
Democratic Republic of the Congo	01/11/1976	01/11/1976	0	0.00
Denmark	06/01/1972	06/01/1972	0	0.00
Djibouti	05/11/2002	05/11/2002	0	0.00
Dominica	17/06/1993	17/06/1993	0	0.00
Dominican Republic	04/01/1978	04/01/1978	0	0.00
Ecuador	06/03/1969	06/03/1969	0	0.00
Egypt	14/01/1982	14/01/1982	0	0.00
El Salvador	30/11/1979	30/11/1979	0	0.00
Equatorial Guinea	25/09/1987	25/09/1987	0	0.00
Eritrea	22/01/2002	17/04/2001	-280	-0.77
Estonia	21/10/1991	21/10/1991	0	0.00
Ethiopia	11/06/1993	11/06/1993	0	0.00
Finland	19/08/1975	19/08/1975	0	0.00
France	04/11/1980	04/11/1980	0	0.00

State	Date ICCPR Ratified	Date ICESCR Ratified	Delay to ICESCR (days)	Delay to ICESCR (years)
Gabon	21/01/1983	21/01/1983	0	0.00
Gambia	22/03/1979	29/12/1978	-83	-0.23
Georgia	03/05/1994	03/05/1994	0	0.00
Germany	17/12/1973	17/12/1973	0	0.00
Ghana	07/09/2000	07/09/2000	0	0.00
Greece	05/05/1997	16/05/1985	-4372	-11.98
Grenada	06/09/1991	06/09/1991	0	0.00
Guatemala	05/05/1992	19/05/1988	-1447	-3.96
Guinea	24/01/1978	24/01/1978	0	0.00
Guinea-Bissau	01/11/2010	02/07/1992	-6696	-18.35
Guyana	15/02/1977	15/02/1977	0	0.00
Haiti	06/02/1991	01/10/2013	8273	22.67
Honduras	25/08/1997	17/02/1981	-6033	-16.53
Hungary	17/01/1974	17/01/1974	0	0.00
Iceland	22/08/1979	22/08/1979	0	0.00
India	10/04/1979	10/04/1979	0	0.00
Indonesia	23/02/2006	23/02/2006	0	0.00
Iran (Islamic Republic of)	24/06/1975	24/06/1975	0	0.00
Iraq	25/01/1971	25/01/1971	0	0.00
Ireland	08/12/1989	08/12/1989	0	0.00
Israel	03/10/1991	03/10/1991	0	0.00
Italy	15/09/1978	15/09/1978	0	0.00
Jamaica	03/10/1975	03/10/1975	0	0.00
Japan	21/06/1979	21/06/1979	0	0.00
Jordan	28/05/1975	28/05/1975	0	0.00
Kazakhstan	24/01/2006	24/01/2006	0	0.00
Kenya	01/05/1972	01/05/1972	0	0.00
Kuwait	21/05/1996	21/05/1996	0	0.00
Kyrgyzstan	07/10/1994	07/10/1994	0	0.00
Lao People's Democratic Republic	25/09/2009	13/02/2007	-955	-2.62
Latvia	14/04/1992	14/04/1992	0	0.00
Lebanon	03/11/1972	03/11/1972	0	0.00
Lesotho	09/09/1992	09/09/1992	0	0.00
Liberia	22/09/2004	22/09/2004	0	0.00
Libya	15/05/1970	15/05/1970	0	0.00
Liechtenstein	10/12/1998	10/12/1998	0	0.00
Lithuania	20/11/1991	20/11/1991	0	0.00
Luxembourg	18/08/1983	18/08/1983	0	0.00
Madagascar	21/06/1971	22/09/1971	93	0.25
Malawi	22/12/1993	22/12/1993	0	0.00
Maldives	19/09/2006	19/09/2006	0	0.00
Mali	16/07/1974	16/07/1974	0	0.00
Malta	13/09/1990	13/09/1990	0	0.00
Mauritania	17/11/2004	17/11/2004	0	0.00
Mauritius	12/12/1973	12/12/1973	0	0.00
Mexico	23/03/1981	23/03/1981	0	0.00
Monaco	28/08/1997	28/08/1997	0	0.00
Mongolia	18/11/1974	18/11/1974	0	0.00
Montenegro	23/10/2006	23/10/2006	0	0.00
Morocco	03/05/1979	03/05/1979	0	0.00
Mozambique	21/07/1993	*ICESCR not Ratified*	-	-
Namibia	28/11/1994	28/11/1994	0	0.00
Nepal	14/05/1991	14/05/1991	0	0.00
Netherlands	11/12/1978	11/12/1978	0	0.00
New Zealand	28/12/1978	28/12/1978	0	0.00
Nicaragua	12/03/1980	12/03/1980	0	0.00
Niger	07/03/1986	07/03/1986	0	0.00
Nigeria	29/07/1993	29/07/1993	0	0.00
Norway	13/09/1972	13/09/1972	0	0.00
Pakistan	23/06/2010	17/04/2008	-797	-2.18

State	Date ICCPR Ratified	Date ICESCR Ratified	Delay to ICESCR (days)	Delay to ICESCR (years)
Panama	08/03/1977	08/03/1977	0	0.00
Papua New Guinea	21/07/2008	21/07/2008	0	0.00
Paraguay	10/06/1992	10/06/1992	0	0.00
Peru	28/04/1978	28/04/1978	0	0.00
Philippines	23/10/1986	07/06/1974	-4521	-12.39
Poland	18/03/1977	18/03/1977	0	0.00
Portugal	15/06/1978	31/07/1978	46	0.13
Republic of Korea	10/04/1990	10/04/1990	0	0.00
Republic of Moldova	26/01/1993	26/01/1993	0	0.00
Romania	09/12/1974	09/12/1974	0	0.00
Russian Federation	16/10/1973	16/10/1973	0	0.00
Rwanda	16/04/1975	16/04/1975	0	0.00
Samoa	15/02/2008	*ICESCR not Ratified*	-	-
San Marino	18/10/1985	18/10/1985	0	0.00
Senegal	13/02/1978	13/02/1978	0	0.00
Serbia	12/03/2001	12/03/2001	0	0.00
Seychelles	05/05/1992	05/05/1992	0	0.00
Sierra Leone	23/08/1996	23/08/1996	0	0.00
Slovakia	28/05/1993	28/05/1993	0	0.00
Slovenia	06/07/1992	06/07/1992	0	0.00
Somalia	24/01/1990	24/01/1990	0	0.00
South Africa	10/12/1998	12/01/2015	5877	16.10
Spain	27/04/1977	27/04/1977	0	0.00
Sri Lanka	11/06/1980	11/06/1980	0	0.00
St. Vincent and the Grenadines	09/11/1981	09/11/1981	0	0.00
State of Palestine	02/04/2014	02/04/2014	0	0.00
Sudan	18/03/1986	18/03/1986	0	0.00
Suriname	28/12/1976	28/12/1976	0	0.00
Swaziland	26/03/2004	26/03/2004	0	0.00
Sweden	06/12/1971	06/12/1971	0	0.00
Switzerland	18/06/1992	18/06/1992	0	0.00
Syrian Arab Republic	21/04/1969	21/04/1969	0	0.00
Tajikistan	04/01/1999	04/01/1999	0	0.00
Thailand	29/10/1996	05/09/1999	1041	2.85
The former Yugoslav Rep. of Macedonia	18/01/1994	18/01/1994	0	0.00
Timor-Leste	18/09/2003	16/04/2003	-155	-0.42
Togo	24/05/1984	24/05/1984	0	0.00
Trinidad and Tobago	21/12/1978	08/12/1978	-13	-0.04
Tunisia	18/03/1969	18/03/1969	0	0.00
Turkey	23/09/2003	23/09/2003	0	0.00
Turkmenistan	01/05/1997	01/05/1997	0	0.00
Uganda	21/06/1995	21/01/1987	-3073	-8.42
Ukraine	12/11/1973	12/11/1973	0	0.00
United Kingdom	20/05/1976	20/05/1976	0	0.00
United Republic of Tanzania	11/06/1976	11/06/1976	0	0.00
United States of America	08/06/1992	*ICESCR not Ratified*	-	-
Uruguay	01/04/1970	01/04/1970	0	0.00
Uzbekistan	28/09/1995	28/09/1995	0	0.00
Vanuatu	21/11/2008	*ICESCR not Ratified*	-	-
Venezuela (Bolivarian Republic of)	10/05/1978	10/05/1978	0	0.00
Viet Nam	24/09/1982	24/09/1982	0	0.00
Yemen	09/02/1987	09/02/1987	0	0.00
Zambia	10/04/1984	10/04/1984	0	0.00
Zimbabwe	13/05/1991	13/05/1991	0	0.00

Appendix D

Time from OECD recessions to Concluding Observations

State	Entered recession	First Concluding Observations after recession	Period before Concluding Observations (days)	Period before Concluding Observations (years)
Hungary	31/12/2006	16/01/2008	381	1.04
Ireland	30/03/2007	08/07/2015	3022	8.28
Greece	30/06/2007	27/10/2015	3041	8.33
Italy	30/06/2007	28/10/2015	3042	8.33
New Zealand	31/12/2007	31/05/2012	1613	4.42
Denmark	31/12/2007	06/06/2013	1984	5.44
Finland	31/12/2007	16/12/2014	2542	6.96
United Kingdom	30/03/2008	12/06/2009	439	1.20
Germany	30/03/2008	12/07/2011	1199	3.28
Turkey	30/03/2008	12/07/2011	1199	3.28
Japan	30/03/2008	10/06/2013	1898	5.20
Austria	30/03/2008	12/12/2013	2083	5.71
Portugal	30/03/2008	07/12/2014	2443	6.69
France	30/03/2008	13/07/2016	3027	8.29
Luxembourg	30/03/2008	State Report due 30/06/2008	-	-
Sweden	30/06/2008	01/12/2008	154	0.42
Netherlands	30/06/2008	09/12/2010	892	2.44
Estonia	30/06/2008	16/12/2011	1264	3.46
Spain	30/06/2008	06/06/2012	1437	3.94
Belgium	30/06/2008	22/12/2013	2001	5.48
Slovenia	30/06/2008	14/12/2014	2358	6.46
Chile	30/06/2008	07/07/2015	2563	7.02
Mexico	30/06/2008	Not Scheduled	-	-
Switzerland	30/09/2008	26/11/2010	787	2.16
Czech Republic	30/09/2008	22/06/2014	2091	5.73
Canada	30/09/2008	23/03/2016	2731	7.48
Norway	31/12/2008	12/12/2013	1807	4.95
Iceland	30/06/2009	11/12/2012	1260	3.45
		Average	1817	4.98

Notes

[1] Data for the 28 OECD member States that entered into recession in the period surrounding the recent financial and economic crises. There are 33 OECD member States in total.

[2] Countries in ascending order according to time delay before Concluding Observations were released.

[3] Luxembourg and Mexico are excluded from averages. If both were to be examined in September 2016 the averages would change to 1905 days and 5.22 years respectively.

[4] Data on entry into recession derived from OECD records on quarterly GDP (OECD (2016), Quarterly GDP (indicator). doi: 10.1787/b86d1fc8-en (Accessed 20 September 2016)).

[5] Entry into recession taken as the start date of the first quarter (of at least two consecutive quarters) of negative GDP growth.

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